FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 5 1948
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1948

No. 11

DOUBLEDAY & COMPANY, INC.,
*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

## BRIEF FOR APPELLANT

WHITNEY NORTH SEYMOUR,
*Counsel for appellant.*

GEORGE G. GALLANTZ,
JAMES F. DWYER,
NEWELL G. ALFORD, JR.,
*of Counsel.*

## SUBJECT INDEX


| | PAGE |
|---|---|
| Opinion below | 1 |
| Jurisdiction and statute involved | 1 |
| Statement | 2 |
| "Memoirs of Hecate County" by Edmund Wilson | 4 |
| The manner in which the book was offered to the public | 6 |
| Critical comment | 8 |
| (a) The book as a whole | 8 |
| (b) Passages complained of by the State | 9 |
| (c) The author | 11 |
| Specification of assigned errors to be urged | 12 |
| Summary of argument | 13 |
| Argument | |
| No suppression of any utterance can be constitutionally justified unless that utterance gives rise to a clear and present danger to some substantial interest of the State. Public discussions of sex are not excluded from this general rule and "Memoirs of Hecate County" does not give rise to any danger, either clear or present, that it will subvert order or morality | 14 |

PAGE

(a) The recent decision in *Winters* v. *New York*, 333 U. S. 507 (1948) establishes that the protection of the First Amendment applies to works of fiction ..... 16

(b) The Fourteenth Amendment, as uniformly construed by this Court since 1925, prohibits the suppression of utterances unless they create a clear and present danger to some substantial interest of the State. This Court has never held that discussions of sex conduct, or any other class of utterances, constitute an exception to this rule ..... 18

(c) Neither the history of the First Amendment, nor any other reason or authority, requires or would justify the Court in now holding that discussions of sex conduct constitute an exception to the "clear and present danger" rule ..... 27

(d) The statute here has been neither narrowly drawn nor narrowly construed to punish specific conduct ..... 37

Conclusion ..... 52

BLEED THROUGH

POOR COPY

## CITATIONS

---

CASES: PAGE

*Bridges* v. *California*, 314 U. S. 252 (1941) .21, 26-27, 31

*Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) . .23-25, 33
*Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942) .....25, 33-34
*Craig* v. *Harney*, 331 U. S. 367 (1947).....23, 52

*Ex parte Jackson*, 96 U. S. 727 (1877) ..... 33

*Gitlow* v. *New York*, 268 U. S. 652 (1925) .....16, 17

*Hannegan* v. *Esquire*, 327 U. S. 146 (1946).....33, 35
*Halsey* v. *New York Society*, 234 N. Y. 1 (1922) 41-42, 48
*Herndon* v. *Lowry*, 301 U. S. 242 (1937) . .20-21, 38, 50

*Minersville District* v. *Gobitis*, 310 U. S. 586 (1940) ..... 19

*Near* v. *Minnesota*, 283 U. S. 697 (1931) ..... 33

*Parmelee* v. *United States*, 113 F. (2d) 156 (App. D. C., 1940) .....33, 35
*Pennekamp* v. *Florida*, 328 U. S. 331 (1946) ..... 23
*People* v. *Berg*, 241 App. Div. 543 (1934), affd. 269 N. Y. 514 (1935) .....45-46, 47, 48
*People* v. *Brainard*, 192 App. Div. 816 (1920).... 41
*People* v. *Eastman*, 188 N. Y. 478 (1907) 15, 31, 40-41, 49
*People* v. *Fellerman*, 243 App. Div. 64 (1934); affd. 269 N. Y. 629 (1936) ..... 46
*People* v. *Gotham Book Mart, Inc.*, 158 Misc. 240 (1936) ..... 48
*People* v. *Miller*, 155 Misc. 446 (1935) ..... 45
*People* v. *Muller*, 96 N. Y. 408 (1884) .....32, 39-40

CASES:

PAGE

*People* v. *Pesky*, 230 App. Div. 200; affd. 254 N. Y. 373 (1930) ..... 42-43
*People* v. *Viking Press, Inc.*, 147 Misc. 813 (1933) . 44-45
*People* v. *Wendling*, 258 N. Y. 451 (1932) ..... 43-44
*People* v. *Winters*, 294 N. Y. 545 (1945) ..... 35, 49

*Queen* v. *Read*, Fort. 98, 11 Mod. 142 (Q. B. 1708) . 31

*Regina* v. *Hicklin*, L. R. 3 Q. B. 360 (1868) 31, 32, 35, 40, 48, 50
*Rex* v. *Curl*, 2 Str. 789, 1 Barn. 29 (K. B. 1727) ... 31
*Rex* v. *DeMontalk*, 23 Crim. App. Rep. 182 (1932) . 36
*Rex* v. *Wilkes*, 4 Burr. 2527 (K. B. 1770) ..... 31

*Saia* v. *New York*, 334 U. S. 558 (1948) ..... 51
*Schneider* v. *State*, 308 U. S. 147 (1939) ..... 20

*Thomas* v. *Collins*, 323 U. S. 516 (1945) ..... 22
*Thornhill* v. *Alabama*, 310 U. S. 88 (1940) ..... 21, 51

*United States* v. *Bennett*, Fed. Case No. 14,571, 24 Fed. Cas. 1093 (S. D. N. Y., 1879) ..... 32
*United States* v. *Kennerley*, 209 Fed. 119 (S. D. N. Y., 1913) ..... 33, 35
*United States* v. *Levine*, 83 F. (2d) 156 (CCA 2, 1936) ..... 33, 48
*United States* v. *One Book Entitled Ulysses*, 72 F. (2d) 705 (CCA 2, 1934) ..... 33, 47

*Winters* v. *New York*, 333 U. S. 507 (1948) 16, 17, 25, 33, 34-35, 38

STATUTES:

New York Penal Law, Subdivision 1 of Section 1141 ..... 1, 14-16, 31, 50
20 & 21 Victoria, Section 1 of Chapter 83 ..... 32

POOR COPY
BLEED THROUGH

OTHER AUTHORITIES: PAGE

Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40 (1938) ..... 31, 48-49

Bradley, *On the Treatment of Sexual Detail in Literature*, 2 Collected Essays 619 (1935) ..... 37

1 Chafee, *Government and Mass Communications* (1947) ..... 34

Cowley, book review, *New Republic*, March 25, 1946 8

De Jong, book review, *Knickerbocker Weekly*, July 22, 1946 ..... 10, 12

Dewey, *Art as Experience* (1934) ..... 35

*Dictionary of American Biography* ..... 30

Grant and Angoff, *Massachusetts and Censorship*, 10 B. U. Law Rev. 146 (1930) ..... 31

146 Hansard's *Parliamentary Debates* (3rd series, 1857) ..... 32

Ingersoll's "The Influence of America on the Mind" (1823) ..... 30

Jefferson's Second Inaugural Address (1805) ..... 28-29

Jefferson's letter to N. Dufief, April 19, 1814 ..... 29

Kazin, book review, *Partisan Review*, Summer 1946 ..... 9, 11, 12

2 *Kent's Commentaries* (1827) ..... 29

Madison's Report on the Virginia Resolutions ..... 28

Nobbe, *The North Briton* (1939) ..... 31

Poore, book review, *New York Times*, March 7, 1946 12

Richmond, book review, *Tomorrow*, June 1946 9, 10-11, 12

OTHER AUTHORITIES: PAGE

Smith, book review, *Saturday Review of Literature*, March 23, 1946 ..... 12

Stephen, *Digest of the Criminal Law* (1877) ..... 36

3 *Story's Commentaries* (1833) ..... 29

*Time*, book review, March 25, 1946 ..... 8-9

2 *Tucker's Blackstone* (1803) ..... 30

*United States Quarterly Book List*, September, 1946 ..... 8, 10

24 *Who's Who in America* ..... 11

POOR COPY

BLEED THROUGH

# Supreme Court of the United States

OCTOBER TERM, 1948

| | |
|---|---|
| DOUBLEDAY & COMPANY, INC., *Appellant,* *vs.* THE PEOPLE OF THE STATE OF NEW YORK | No. 11 |

## BRIEF FOR APPELLANT

### Opinion Below

The three-judge court which tried this case without a jury in the Court of Special Sessions of the City of New York decided for conviction of the appellant by a two to one vote. The majority wrote no opinion. The dissenting justice wrote an opinion (R. 47-48) which is unreported.

The Appellate Division of the New York Supreme Court and the New York Court of Appeals each affirmed without opinion. Their decisions are reported respectively at 272 App. Div. 799 and 297 N. Y. 687.

### Jurisdiction and Statute Involved

The appellant was convicted of violating subdivision 1 of section 1141 of the New York Penal Law (New York Laws of 1909, Ch. 88, as amd. by Laws of 1941, Ch. 925) in that it published and sold an "obscene" book, namely, "Memoirs of Hecate County", by Edmund Wilson. The statute in question, so far as material, reads as follows:

> "A person who sells * * * or has in his possession with intent to sell, lend, distribute or give away, or to show * * * any obscene, lewd, lascivious, filthy, indecent or disgusting book * * * or who * * * prints, utters, publishes, or in any manner manufactures, or prepares any such book * * * Is guilty of a misdemeanor * * *."

The judgment below was a final judgment rendered by the highest court of the State of New York in which a decision could be had. The appellant contended that the above quoted statute, as construed and applied to it, was invalid because repugnant to the Constitution of the United States. The decision of the State court was in favor of the statute's validity (R. 60-61; 297 N. Y., at p. 688).

Jurisdiction of this appeal was conferred by the provisions of Section 273(a) of the Judicial Code of 1911, formerly 28 U. S. C. § 344(a), but since superseded by Title 28, United States Code, § 1257(2), effective September 1, 1948.

Probable jurisdiction was noted on March 15, 1948 (R. 67).

## Statement

The appellant stands convicted of having published and sold a book. By virtue of that conviction it has been compelled to pay a fine of $1,000 (R. 46) and has been admonished by the trial court that any future publication or sale of this book would constitute a violation of the "established law * * * of New York City", punishable by a one-year prison term (R. 43).

It has become a commonplace that the Fourteenth Amendment prohibits the States from taking any action

POOR COPY

BLEED THROUGH

which abridges the freedom of the press and, *prima facie*, it is hard to conceive of a clearer act of abridgment of that great freedom than is involved in the judicial act of punishment for the publication of a book. Such a judicial act is, however, here to be reviewed and, although the grave constitutional implications of that act were urged before the trial court (R. 14, 38, 39, 45) and before two higher State courts, this Court unfortunately does not have the benefit of any expression of views from the State courts which would even tend to justify this abridgment under the decisions of this Court as to the broad sweep of the First Amendment.

The evidence, upon which the conviction rests, consists only of the book itself and of the appellant's concession that it published and sold the book to a representative of the Society for the Suppression of Vice (R. 11-14).

The two informations upon which the appellant was tried described the book as "obscene" (R. 4), and the appellant was found guilty by a majority consisting of two justices (R. 42). Thus, the judicial act under review must be justified, if it can be justified at all, upon the basis of an implied finding that a mere reading of the book led to the conclusion that it is "obscene", even though the law of New York nowhere contains any adequately narrow definition of that word.

It will not here be urged that the great breadth of the freedom of the press is of such dimension that it includes the freedom to publish obscene writings, so long as that term is narrowly defined and applied. The appellant will, however, contend that any definition of the word "obscene", so broad as to catch up a bona fide work of literature, may not constitutionally be applied to prohibit the publication

of such a work. That "Memoirs of Hecate County", the book here in question, is a bona fide work of literature and not commercial pornography, cannot be seriously disputed. Its content, the manner in which it was published and offered for sale, the eminence of its author and the comment with which it was received by the literary world, all serve to underscore the inescapable conclusion that it is a serious work of literature which, under the protection of the Constitution, its author was entitled to write and the public was entitled to read.

**"Memoirs of Hecate County," by Edmund Wilson**

Since the only evidence offered against the appellant consisted of the book itself, this Court will find it impracticable to consider the issues now before it without reading the book in its entirety. In these circumstances, no detailed description of the book will be attempted.

Briefly, the book consists of six interrelated stories. In the language of one eminent literary critic, who testified for the appellant, it is largely a satirical work which undertakes to characterize the quality of modern culture and modern civilization in several literary groups. It makes a rather stern and severe judgment on what is happening in our modern culture (R. 29). The figure of the devil appears frequently in the book—sometimes as a political character, sometimes as a literary character, but always as a functioning character. The devil is portrayed as representing forces of egoism, pride, vulgarity and surrender of moral integrity (R. 30).

The literary method of the book is not a conventional one. Its efforts to deride the immorality of the upper middle class in suburban New York during the period

POOR COPY

BLEED THROUGH

between the two World Wars is made, not by means of the more frequently used running narrative, but by means of a nightmarish satire on American suburban life cast in the form of detached but interdependent stories. One is in the form of a parable; another takes the form of a series of visions of past events; a third is chiefly devoted to a conversation with a man who identifies himself as the devil. Taken as a whole, the book is a series of studies of the impotence and corruption of an identifiable social milieu.

The first story, "The Man Who Shot Snapping Turtles", is the parable. In a brief and biting satire, it presents one Stryker, who first seeks to protect his ducks, which he described as creatures of God, from the attacks of snapping turtles. Frustrated in that effort, Stryker then decides to exploit the turtles by commercializing them. Finally he is killed by the rifle he had once used to destroy the turtles.

"Ellen Terhune" is the story told through a series of visions of the past. It portrays the artistic strivings of a woman whose parents' ambitions and domestic difficulties cause her ultimate frustration.

"Glimpses of Wilbur Flick" presents Flick as a wealthy playboy who drifts in a functionless life through alcoholism and narcotics, through psychoanalysis, fascism, and finally communism.

"The Princess with the Golden Hair" is a story of sexuality and promiscuity, skillfully told. Its central character is an esthete, an egotist who fails to see in himself the very frustrations which he has so carefully chronicled in others. The story's two other chief characters are women whose personalities and backgrounds the author expertly contrasts. The male protagonist is pictured as devoting almost all his time and thought to the sexual conquest of both women

alternately. But the point the story brings home to the reader is the futility of such a life and of the fact that the conquest, even when achieved, affords the hero not even fleeting happiness.

"The Milhollands and Their Damned Soul" is a satire on book clubs, book publishers, and the highly commercialized methods used by them to stereotype the tastes of the public.

It is the last story, "Mr. and Mrs. Blackburn at Home", in which the devil appears in the role of a wealthy suburbanite and expounds his derogatory views on both Hitler and Stalin, but suggests also that there is much opportunity for the devil's work in America. The book ends on a note of continued frustration as the narrator finally relapses into the compromised existence in which he has always lived.

### The Manner in Which the Book Was Offered to the Public

The book here under consideration was not a pamphlet devoted to pornography and prepared for sale under the counter. It was a serious work of a serious author treating an important subject. It was bound and marketed in the usual manner. Its dust jacket did not call attention to the few passages to which the State has since taken objection. On the contrary, its announcement read: "This brilliant work of fiction describes the adventures of an egotist among the bedeviled."

The flyleaf of the dust jacket described the book in the following terms:

POOR COPY

BLEED THROUGH

"MEMOIRS OF HECATE COUNTY is a series of interrelated chronicles about a group of suburbanites, typical of the generation so glibly called 'lost.' Under Mr. Wilson's scrutiny they take on a new dimension, and that term no longer describes them. Lost they are, but they are also bedeviled. Evil is a positive power in their universe, and this is the keynote to their spectacular failure.

"One of the stories in this book is 'The Man Who Shot Snapping Turtles,' a masterpiece of macabre irony in which a man who conquers and turns to success his greatest mania is at last defeated and destroyed by it. 'Glimpses of Wilbur Flick' is the story of a spoiled rich man looking for an excuse for his existence. Success, when it comes, is ephemeral and we see him in the end supporting a group of ineffectual left-wing intellectuals—the last resort of a rich man's sense of guilt.

"All are about the American middle class between wars which has often been analyzed in fiction but never with the detachment and finality that Edmund Wilson achieves in this brilliant work."

The book's publisher—the appellant here—far from being a fly-by-night anonymous publisher of bawdy leaflets, was and is a leader in the field of publication of serious literary works. Its reputation is beyond dispute and was fully developed at the trial (R. 16-18). Some of its advertisements of this book have been reproduced in the transcript (R. 46A-46E) and they, too, show that no reference whatever was ever made by the publisher to the features of the book which led the State to seek its suppression.

## Critical Comment

### (a) The Book As a Whole

As part of the appendix to this brief we have compiled a collection of comments made concerning "Memoirs of Hecate County" by some of the leading periodicals which customarily deal with literature. It is not suggested that the appraisals contained in this appendix represent the unanimous views of all the critics who reviewed the book. The collection does show, however, that the book was invariably received as a significant literary work.

Probably the most important among the reviews included is one published in the *United States Quarterly Book List*, a publication of the Library of Congress, and for all the contents of which "the Library of Congress assumes full responsibility". This "highly selective" list has as its purpose "to make known the current literary, learned, and scientific contributions of the United States" and it is significant that "Memoirs of Hecate County" was included among them. Those concerned with directing the attention of the world to important American cultural achievements surely would not include a book which could fairly be called obscene. The review included is brief and no quotations from it are necessary here.

Some of the comments on the book as a whole which are to be found in the other reviews are worth noting. Malcolm Cowley in the *New Republic* summarized the book in these terms: "Morally it is the scene of a conflict between good and evil, in which evil is stronger and more personalized * * * and wins minor victories one after another, but never achieves a complete triumph." *Time* thought the book to be "the first event of the year which can be described as 'literary'. For it is more & more unusual

POOR COPY

BLEED THROUGH

for U. S. writers to try to produce literature which is serious without solemnity, entertaining without shallowness, intelligent without owlishness, socially observant without being dogmatically vindictive, morally acute without being mealymouthed." It "is pretty certainly the best contemporary chronicle, so far, of its place and period."

The suburban residents in the book "are described with brilliance, erudition, and keen insight". The stories are serious, "entertaining, intelligent, socially observant, and civilized. Mr. Wilson has written what appears to be the definitive book about a group of people who have failed both the world and themselves spectacularly." (John Richmond in *Tomorrow,* June, 1946.) Although Alfred Kazin (*Partisan Review,* Summer, 1946) thought Mr. Wilson's work "not a good book", he opened his lengthy commentary with the statement:

> "In its mordant analysis of our middle-class culture, in its pessimism and in the symbolic attempt of its hero to find his true class, this book resembles *The Education of Henry Adams.*"

and closed it with:

> "His book will live not because it is a work of imagination, but because it is a sourcebook in the sadness of Americans."

**(b) Passages Complained of by the State**

In the story, "The Princess With the Golden Hair", the author, in developing his theme, included several passages which describe in explicit detail the narrator's thoughts and experiences during the course of several sexual acts. As we understand it, the State has never claimed that the characters and acts described lacked

verisimilitude; nor that the story or descriptions were without literary merit; nor that the language of the questioned descriptions was profane. Reduced to its essentials the prosecution has been based solely upon the fact that in several brief passages of the book the relations between the sexes were treated with candor.[1] Many of the critics, however, did not consider the author's candor to be inappropriate to the subject matter of the book.

Long before this litigation was brought, the Library of Congress, after referring to the questioned passages, said: "The total effect of the story, however, derives from the self and social analysis, more courageous than smug." Dola De Jong took issue with those who thought the story "immature and pornographic". "It is rather the true picture of the American man in the stratum of society where people like Mr. Wilson linger. A world full of intellectual, egotistical and immature men, intelligent, emotionally starving society women, and lower class girls with a lot of dignity and sense, but forever victimized. * * * There may be people who buy *Memoirs of Hecate County* for the 'Purple' in it but in looking for those paragraphs they will have to read the book and there is a good chance that they will acquire a taste for good literature" (*Knickerbocker Weekly*, July 22, 1946). John Richmond suggested that the prurient may regard the passages as pornography but "sensitive, intelligent adults will recognize this story for more than a hauntingly beautiful descrip-

[1]In its brief to the trial court, the State made the additional point that the story contained no lesson in morality, that its chief character had not displayed any contrition or remorse. But in the appellate State courts the prosecution shifted its ground somewhat by saying that "the story attempts to express no moral judgment."

POOR COPY

BLEED THROUGH

tion of all the nuances and depths of a man's true love for a woman." Alfred Kazin commented that: "Nothing could be further removed from passion; or even neurotic conquest; or even from mechanical lechery."

The dissenting trial justice expressed a similar view (R. 48):

> "The writer of the story is evidently and honestly concerned with the complex influences of sex and of class consciousness on man's relentless search for happiness. That is a problem which is also of deep concern to the matured reading public. That public is entitled to the benefit of the writer's insight and that right may not be lightly disregarded by excluding from consideration all interests but those of the young and immature."

**(c) The Author**

Edmund Wilson is recognized as a leading American literary critic. He enjoys a worldwide reputation "perhaps higher than any other one critic" (R. 28). His earlier works have been acclaimed by the literary world and some are used as text books in literature courses given by leading universities (R. 28-29).[2]

---

[2]The current volume 24 of *Who's Who in America* contains the following sketch of Edmund Wilson's career: Reporter on the New York Evening Sun, 1916-17; mng. editor Vanity Fair, 1920-21; associate editor New Republic, 1926-31; book reviewer for the New Yorker since 1944. * * * Author: The Undertaker's Garland (with John Peale Bishop), 1922; Discordant Encounters (dialogues and plays), 1926; I Thought of Daisy (novel), 1929; Poets, Farewell! (verse), 1929; Axel's Castle (lit. criticism), 1931; The American Jitters—A Year of the Slump, 1932; Travels in Two Democracies, 1936; This Room and This Gin and These Sandwiches (plays), 1937; The Triple Thinkers, 1938; To the Finland Station, 1940; The Boys in the Back Room, 1941; The Wound and the Bow, 1941; Note-Books of Night, 1942; The Shock of Recognition (anthology), 1943.

Contemporary criticism recognizes Mr. Wilson as "the most perceptive and informed and implacable of contemporary American critics" (Charles Poore in the *New York Times*, March 7, 1946), one who "possesses the intellectual background, analytical faculties, the mind to dissect and reassemble the truth, the appreciation of originality and the feeling for logic that make the superb critic. * * * His latest fictional work, *Memoirs of Hecate County*, shows the same qualities as we mentioned above." (Dola DeJong in the *Knickerbocker Weekly*.) Much other comment is to the same effect. For example: "One of America's most distinguished literary critics" (John Richmond in *Tomorrow*, June, 1946); "the sharpest and most readable literary critic of our time" (Harrison Smith in the *Saturday Review of Literature*, March 23, 1946). Alfred Kazin in the *Partisan Review* (Summer, 1946) speaks of Mr. Wilson's talent as "so much like Henry Adams's, and like Adams's driven, by a longing for excellence, true aristocracy, and a social home."

A further measure of Mr. Wilson's stature may be found in the fact that an entire issue of the Princeton University Library Chronicle (volume V, number 2; February, 1944) has been devoted to him and his works.

**Specification of Assigned Errors to be Urged**

The appellant will urge all of the errors assigned (R. 63), namely, that the Court of Appeals of the State of New York erred in affirming the judgments of the lower State courts; in holding that the statute as construed and applied to appellant is not void or violative of appellant's rights under the due process clause of the Fourteenth Amendment because it

POOR COPY

BLEED THROUGH

abridges appellant's right to the freedoms of speech and of the press; in holding that the statute as so construed and applied did not deprive appellant of its property without due process of law; and in holding that appellant's conviction and punishment under the statute was not unconstitutional, illegal, void and of no effect under the due process clause.

## Summary of Argument

That the First Amendment extends its protection to works of fiction as well as to works devoted exclusively to the exposition of ideas is now clear. Therefore, the only basis upon which the State of New York could attempt to suppress the publication of "Memoirs of Hecate County" was the fact that in several of its passages it frankly discusses sex conduct.

The general rule is that no expression upon any subject may be suppressed unless the expression gives rise to a clear and present danger to some substantial interest of the State, and unless the expression is uttered under circumstances affording no opportunity to test its merits by competition for acceptance in the market of public opinion. The question here is whether that general rule is to be limited so that only the single subject of sex conduct is to be excluded from its protection. Nothing in the history of the Bill of Rights and no other reason or authority warrants that such an exception be now delineated.

Assuming that no such exception exists and that discussions of sex conduct, like discussions of any other subject, are entitled to the full protection of the First Amendment, the question is whether the New York statute, as construed and applied here, was sufficiently narrowly defined to prohibit specific conduct. Such a narrow definition is to be

found neither in the earlier opinions of the New York State courts nor in the decisions rendered here without opinion. In any event, and regardless of the construction placed upon the New York statute in earlier cases, the statute is incapable of any construction which would authorize suppression of this bona fide work of literature without violating the Constitution.

This book is a bona fide work of literature because its main purpose is to comment with verisimilitude upon an identifiable social milieu as that milieu manifested itself during an identifiable period in an identifiable locality. The occasional explicit reference to the sexual act was merely incidental to the larger and concededly proper purposes of the publication, and there was no constitutional basis upon which any court could have arrived at a different conclusion.

## Argument

**NO SUPPRESSION OF ANY UTTERANCE CAN BE CONSTITUTIONALLY JUSTIFIED UNLESS THAT UTTERANCE GIVES RISE TO A CLEAR AND PRESENT DANGER TO SOME SUBSTANTIAL INTEREST OF THE STATE. PUBLIC DISCUSSIONS OF SEX ARE NOT EXCLUDED FROM THIS GENERAL RULE AND "MEMOIRS OF HECATE COUNTY" DOES NOT GIVE RISE TO ANY DANGER, EITHER CLEAR OR PRESENT, THAT IT WILL SUBVERT ORDER OR MORALITY.**

In approaching discussion of the principles of constitutional interpretation which must be applied here, two basic facts must be kept in mind: First, we are not dealing with a statute narrowly drawn to define specific conduct. Subdivision 1 of section 1141 of the New York Penal Law

POOR COPY

BLEED THROUGH

speaks only of obscenity and of a long list of its synonyms[8] and leaves to the executive and judicial branches of the State the widest possible discretion in its application. Thus, the statute gives no information as to whether obscene writings are to be kept only from the young and immature; nor as to whether scientific works dealing with sex physiology are to be excepted from the reach of the statute; nor as to whether the prohibition is to be limited only to profane and other unconventional langauge.

Second, unlike the situation in most of the First Amendment cases which have come before this Court in recent years, we do not have in this case any clear guidance as to the limits of the "substantive evil" which the statute was designed to prevent. Thus, neither the statute itself, nor any authoritative interpretation of it, informs us whether it is designed only to prevent the suggestion of impure thoughts to the young and immature, or whether it is designed to shield the entire community from any discussion of sexual matters, or whether it is considered an effective instrument against incitement to sex crimes. Any one of these ends and many more are evils concerning which the legislature of the State may have had preferences or beliefs. But this Court, in the discharge of its historic function, must decide for itself whether the evil intended to be prevented can in fact support the penalizing of an utterance.

---

[8]See *People* v. *Eastman*, 188 N. Y. 478 (1907), in which the doctrine of *noscitur a sociis* was applied to the words "lewd, lascivious, filthy, indecent or disgusting" and in which it was said that the predecessor of section 1141(1) was "a declaration of the penalties to be imposed upon the various phases of the crime of obscenity." In no other New York decision has any meaning been given to the quoted words other than is generally given to the word "obscene".

And since the supposed evil itself is nowhere adequately defined, there is no basis upon which this Court could rest a conclusion that it is of sufficient weight, substance and seriousness to justify the restriction upon the freedom of the press which has been imposed here.

These two considerations alone would justify grave doubt as to the validity of the statute as it was construed and applied to this appellant and to this book. Moreover, we shall demonstrate in this brief that regardless of the nature of the evil which New York's legislature was attempting to avert when it enacted section 1141(1), the lower courts could not reasonably have concluded that the publication and sale of this book would endanger any paramount interest of the State. And, as a corollary to the development of that argument, we shall also show that there is no basis whatever for supposing that writings charged with being obscene were somehow impliedly excluded from the broad protection of the First Amendment.

**a. The recent decision in *Winters* v. *New York*, 333 U. S. 507 (1948) establishes that the protection of the First Amendment applies to works of fiction.**

This Court, in 1925, in *Gitlow* v. *New York*, 268 U. S. 652, recognized for the first time that the Fourteenth Amendment prohibits the States from abridging the freedoms of speech and of the press protected by the First Amendment. Since that decision, this Court has repeatedly reaffirmed that principle. But on almost all those occasions the Court was concerned with attempts by a State to interfere with utterances bearing on political, economic or religious issues.

POOR COPY

BLEED THROUGH

Only recently has the Court had occasion to lay to rest the contention "that the constitutional protection for a free press applies only to the exposition of ideas". With respect to that contention, the Court said, in *Winters* v. *New York*, 333 U. S. 507, 510 (1948):

> "The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature. Cf. *Hannegan* v. *Esquire*, 327 U. S. 146, 153, 158."[4]

This view is in harmony with the historic background of the constitutional protection of a free press. It was foreshadowed by the language of the letter from the Continental Congress to the Inhabitants of Quebec: "The importance of this [freedom of the press] consists * * * [in] the advancement of truth, science, morality and *arts* in general * * *."[5] (Italics added.)

With the decision in the *Winters* case, it has now become evident that the right of this appellant to publish and sell this book—even though it is a work of fiction—must be measured by the same principles which have governed the decisions involving attempts to restrict freedom of speech and of the press since the *Gitlow* case. Those decisions clearly demonstrate that the courts below were wrong in

---

[4]The sentence immediately following in the *Winters* opinion bears directly on the issues presented on this appeal but it will be treated at a subsequent point in this brief (*infra*, p. 33).

[5]Journal of the Continental Congress, 1904 Ed., vol. I, p. 104, at p. 108.

excepting the literary work involved here from constitutional protection by so construing and applying the New York statute as to suppress it.

**b. The Fourteenth Amendment, as uniformly construed by this Court since 1925, prohibits the suppression of utterances unless they create a clear and present danger to some substantial interest of the State. This Court has never held that discussions of sex conduct, or any other class of utterances, constitute an exception to this rule.**

The statute under which the appellant was prosecuted deals with "obscenity" and it has from time to time been erroneously assumed that the First Amendment, given its broadest possible scope, does not protect against prosecution for the publication of "obscene" utterances. Moreover, the lower courts here seem also to have assumed that "obscenity" includes everything dealing with the subject of sex. Such a view seems to have been based upon the further assumption—although our research has revealed no point at which it has ever been substantiated—that such utterances, in and of themselves, present some subtle danger to the State's interest in order and morality. But there is at least as much reason for believing that some threat to order and morality results from the banning of such utterances and from the publicity given to the activities of the Society for the Suppression of Vice and other volunteer censors (See Jefferson, as quoted in appendix to this brief, p. 38; Ingersoll, *ibid.*, p. 44; and Neilson, *ibid.*, pp. 54-55).

The State's legitimate interest in preserving order and morality cannot, of course, be doubted. But the mere exist-

BLEED THROUGH POOR COPY

ence of such a legitimate interest does not authorize a vague and dangerously expansive exception from the prohibition against abridgment of the freedom of the press. As the late Chief Justice Stone, dissenting, said in *Minersville District v. Gobitis*, 310 U. S. 586, 604-605 (1940):

> "History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good. * * * The framers were not unaware that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection."

The question here is not whether the legislature of New York State believed that morality would be better served by the suppression of a discussion of sexual subjects. The question is rather what, if any, danger has been threatened by the appellant's publication. And if it be assumed that such a danger existed, what was the nature and extent of that danger. Was it sufficiently grave to warrant suppression otherwise prohibited?

In the lower courts there was neither proof nor finding that any danger whatever existed, or even threatened. The decision of the trial court was a general finding of "guilty" without explanation. The State's appellate courts affirmed without elucidation. Aside from the constitutional infirmities inherent in a judgment entered without the support of such proof, there is nothing in this record to indicate that the State courts considered either the nature or the extent of the presumed danger or that such consideration was even deemed relevant.

Under the settled law, as enunciated by this Court, it would not even have been sufficient for the lower courts to find that the book did give rise to some danger. For when courts are called upon to except an utterance from the protection of the Constitution, they must undertake "the delicate and difficult task" of weighing the circumstances and of appraising "the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights" of freedom of speech and of the press, *Schneider* v. *State*, 308 U. S. 147, 161 (1939).

There is no evidence whatever in this record that the State courts even recognized the necessity of discharging that obligation. Their failure even to deal in opinions with the claim of constitutional protection at least suggests that they regarded the claim as trivial. Nor, apart from a series of assumptions upon assumptions which are implied in their decisions, have any reasons—substantial or otherwise—ever been advanced in support of the prohibition of this appellant's free enjoyment of its rights.

Contrasted with this lack of support for the judgment below are the conditions which this Court has said must be met before any interference with the freedom of the press will be tolerated.

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need vio-

BLEED THROUGH

POOR COPY

lates the principle of the Constitution." *Herndon* v. *Lowry*, 301 U. S. 242, 258 (1937).

And even a clear danger of substantive evil is not enough. Even when such a danger exists, it does not justify abridgment of the liberty of free discussion unless it arises under circumstances affording no opportunity to test the merits of the utterance by competition for acceptance in the market of public opinion. *Thornhill* v. *Alabama*, 310 U. S. 88, 104-105 (1940).

> "Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial', Brandeis, J., concurring in *Whitney* v. *California*, *supra* [274 U. S. 357], 374; it must be 'serious', *id.* 376. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider* v. *State*, 308 U. S. 147, 161.
>
> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges* v. *California*, 314 U. S. 252, 262-263 (1941).

This Court has recognized that one of its gravest duties is to say where the individual's freedom ends and the State's power begins, *Thomas* v. *Collins*, 323 U. S. 516, 529 (1945). It was there said, in connection with the choice to be made between the individual's freedom and the State's power (at pp. 529-530):

> "Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Prince* v. *Massachusetts*, 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153.
>
> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

And just as this Court is not bound by the legislative judgment which underlies the enactment of the statute in

POOR COPY

question, so it is not bound even by explicit findings of fact made by the State court. This is evident from the minute analysis of the facts made in *Pennekamp* v. *Florida*, 328 U. S. 331 (1946) and in *Craig* v. *Harney*, 331 U. S. 367 (1947). The priorities which have consistently been accorded to the great freedoms of the First Amendment led this Court, in the *Craig* case, to an independent examination of the facts and to a reversal of a specific affirmative finding by the trial court that the utterances there in question had in fact given rise to a clear and present danger to the administration of justice. Certainly any supposed implicit finding here, unsupported by the record and opposed by informed common knowledge of the habits of literate readers, cannot stand in the way of the performance by this Court of its duty to appraise for itself the supposed justifications for suppression.

Such an analysis of the facts was also made in *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) and that case is closely in point. The offense of Cantwell was that he had committed a common law incitement to a breach of the peace. This Court recognized that such a conviction was "analagous to a conviction under a statute sweeping in a great variety of conduct under general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application". Referring to the "clear and present danger" rule, the Court reaffirmed that a State may not unduly suppress free communication of views under the guise of conserving desirable conditions. It therefore, in great detail, examined into the manner in which Cantwell was said to have committed a breach of the peace. It considered his deportment; it was neither noisy, truculent, overbearing nor offensive. It considered whether he intended to insult those for whom he

played a phonograph record on the public streets. It considered the question whether Cantwell's acts had disturbed others. All those questions it answered favorably to Cantwell.

The fact that Cantwell's hearers were actually highly offended did not prevent the Court from reversing the judgment of conviction. Earlier decisions to the effect that, regardless of intent, statements likely to provoke disturbance of good order are punishable, were distinguished upon the ground that in practically all of them the provocative language was held to amount to a breach of the peace because it consisted of "profane, indecent, or abusive remarks *directed to the person of the hearer*". (Italics added.)

The reversal was based upon the broad doctrine that "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy". Therefore, "in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State", Cantwell's conduct was held not to justify conviction of the common law offense.

This consideration of the *Cantwell* case indicates the path which previous decisions show to be proper for analysis of the record here. Just as there was no showing in the *Cantwell* case that the petitioner's deportment was unseemly, there is no showing here that the book in question was offered to the public except as a serious work of literature and in a dignified manner. As in the *Cantwell* case, it is not here claimed that the appellant or the author of the book intended to insult or affront anybody. The fact that

BLEED THROUGH POOR COPY

a regular employee of the Society for the Suppression of Vice was stimulated to action against this book is of no greater consequence here than was the fact that a member of the Catholic faith was highly offended by the playing of Cantwell's phonograph record. There is in this book no language which can be construed as equivalent to an indecent remark directed to the person of the hearer.

Since there is no distinction between language of persuasion and language of fiction (*Winters* v. *New York, supra*), there can be no basis for distinction between the *Cantwell* case and the case at bar.

The application here of the rationale of the *Cantwell* case does not require a holding that all statutes dealing in general terms with the subject of obscenity are invalid on their face, any more than does the *Cantwell* case itself prohibit future prosecutions for the commission of a common law breach of the peace. Reversal in the case at bar would merely require that, in the future, courts charged with the duty of enforcing obscenity statutes should examine the work in question and the circumstances of its publication for the purpose of determining whether the motive of the artist, as gathered from the publication itself, was such as to lead to the reasonable conclusion that it was uttered for the purpose of subverting the morals of the community. Doubtless if there had been any evidence in the *Cantwell* record that he had been truculent or offensive, or that he had directed abusive remarks to the person of his hearers, the result in that case would have been different. Cf. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942). So here, the distinction between this book and commercial pornography is easily drawn. There is no reason that serious literature should be shackled by suppression merely because the au-

thorities wish to stamp out the wholly unrelated commerce in bootlegged postcards or broadsides.

It is of course unnecessary to decide here the nature of every publication which would survive such a test. As in all fields of law, there will be areas in which there may be debate, as there can be none here, as to whether some future publication is or is not a bona fide work of literature. But the possibility of future dilemmas has never induced this Court to favor suppression in order to avoid them and of course, it will not here. The very "clear and present danger" rule itself breeds dilemmas but they are better than restraints. And if that rule is to have real meaning, it must be equally applied to all utterances concerning which it is charged that their publication constitutes a menace to society. Otherwise the growth in understanding which is an important goal of a free literature will be stunted because it will often be the target of those who favor directed thought over free development.

It is perhaps unnecessary to point out that the ancient vintage of obscenity statutes does not invest their construction and application with any immunity from scrutiny by this Court. The language of the *Bridges* case, *supra*, shows clearly that long acquiescence in violations of the Constitution, even by courts in protecting their own proceedings, will not be permitted to create a prescriptive right in suppression. With respect to the power of a State to punish out-of-court publications as contempts, it was there said (at pp. 267-268):

> "But state power in this field was not tested in this Court for more than a century. Not until 1925, with the decision in *Gitlow* v. *New York*, *supra*, 268 U. S. 652, did this Court recognize in the Fourteenth

POOR COPY

BLEED THROUGH

Amendment the application to the states of the same standards of freedom of expression as, under the First Amendment, are applicable to the federal government. And this is the first time since 1925 that we have been called upon to determine the constitutionality of a state's exercise of the contempt power in this kind of situation. Now that such a case is before us, we cannot allow the mere existence of other untested state decisions to destroy the historic constitutional meaning of freedom of speech and of the press."

So, here, it is not too late—nor, indeed, is it too early—for this Court to announce that there is nothing which excludes from the historic constitutional meaning of freedom of speech and of the press the right of a serious literary artist publicly to discuss the relations between the sexes to the extent he deems necessary for the development of his artistic conception.

**c. Neither the history of the First Amendment, nor any other reason or authority, requires or would justify the Court in now holding that discussions of sex conduct constitute an exception to the "clear and present danger" rule.**

Any assumption, heretofore sometimes casually indulged without particular examination, that the First Amendment, given its broadest possible scope, does not protect against prosecution for the publication of "obscene" utterances, proves upon analysis to be erroneous. Those who have made the assumption somehow seem to suppose that the literary presentation of sexual problems is in some sort of category by itself, and that therefore any description of sex conduct is removed from the constitutional pro-

tection of the freedom of the press. As sex is a rather common phenomenon, and interest in relations between the sexes is not unusual, this easy and unjustified assumption would deny protection to discussion of a significant part of human life. This case presents the opportunity to examine this question and to determine whether such an exception to the unequivocal language of the Amendment is justified.

Our research has revealed nothing in the history of the Bill of Rights which would support that exclusion. Madison, the leading spirit in its preparation, when he had occasion to describe the practice and sentiment leading to the guaranties of the freedom of the press in State constitutions, said:

> "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits."[8]

---

[8]Report on the Virginia Resolutions, Madison's Works, Vol. 4, p. 544. See also Jefferson, Second Inaugural Address (1805) in Padover, *The Complete Jefferson*, 410, 413-414:

> "No inference is here intended, that the laws, provided by the State against false and defamatory publications, should not be enforced; he who has time, renders a service to public morals and public tranquility, in reforming these abuses by the salutary coercions of the law; but the experiment is noted, to prove that, since truth and reason have maintained their ground against false opinions in league with false facts, the press, confined to truth, needs no other legal restraint; the public judgment will correct false reasonings and opinions, on a full hearing of all

POOR COPY

BLEED THROUGH

Moreover, while it is true that some "abuses" of the press were well recognized at that time as subject to the sanction of the law, these specifically were abuses which in the law of libel were classified as private wrongs. Indeed, it was to this category of abuse, and only this, that Chancellor Kent addressed himself when he made the much quoted statement:

> "every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right; and that no law can rightfully be passed to restrain or abridge the freedom of speech or of the press".[7]

This view was forcefully put by Judge Tucker in his edition of Blackstone (1803):

> "Liberty of speech and of discussion in all speculative matters, consists in the absolute and uncontrollable right of speaking, writing, and publishing, our opinions concerning any subject, whether religious, philosophical, or political; and of inquiring

---

parties; and no other definite line can be drawn between the inestimable liberty of the press and its demoralizing licentiousness. If there be still improprieties which this rule would not restrain, its supplement must be sought in the censorship of public opinion."

Compare Jefferson's letter to N. Dufief, April 19, 1814, reprinted in full in the appendix to this brief, p. 37.

---

[7]2 *Kent's Commentaries* (1827) p. 14. This limitation of abuses of the press to private injuries had been continually reiterated by Jefferson, see the material reprinted in the appendix to this brief, p. 39. Story recognized the existence of this view, 3 *Story's Commentaries* (1833) pp. 738-739, but he did not commit himself on it, although he thought that the states could punish the "licentiousness" of the press if the national government could not. Nor did Story mention obscene publications as an abuse of the press, *ibid.*, pp. 739-743.

into and, examining the nature of truth, whether moral or metaphysical; the expediency or inexpediency of all public measures, with their tendency and probable effect; the conduct of public men, and generally every other subject, without restraint, except as to the injury of any other individual, in his person, property, or good name."[8]

That the framers of the First Amendment did not go beyond these principles is explained simply by the fact that they were never confronted with the problem raised by the public discussion of matters of sex in the terms in which we have since become acquainted with it. But, certainly, these principles as enunciated lend no support to the opinion that one isolated subject of literature was considered by the framers of the Bill of Rights to be in a category apart from all others.[9] To the people of those historic days the progress

---

[8]2 *Tucker's Blackstone* (1803) App. Note G, "Of the Right of Conscience; and of the Freedom of Speech and of the Press", at p. 11. St. George Tucker, a member of the Virginia Bar and a Professor of Law at William and Mary, was from 1803 to 1811 Judge of the Supreme Court of Appeals of Virginia and from 1813 to 1827 of the Federal District Court. See his biography by Armistead M. Dobie in the *Dictionary of American Biography*. A more extensive quotation from Judge Tucker's comment is reprinted in the appendix to this brief, p. 41.

[9]Obscenity was, as early as 1823, referred to specifically as one of the abuses of the press entitled to toleration under the principles of the First Amendment. This was by the Hon. Charles Jared Ingersoll in "The Influence of America on the Mind", the annual address to the American Philosophical Society (Philadelphia, 1823). Ingersoll (1782-1862) was a member of the Pennsylvania bar, a member of Congress 1812-14, serving as chairman of the House Judiciary Committee, from 1815 to 1829 a United States Attorney, and a member of Congress 1840-1849, serving as chairman of the House Committee on Foreign Affairs. See *Dictionary of American Biography*. An excerpt from his address is included in the appendix to this brief, p. 43.

POOR COPY

BLEED THROUGH

of the sciences of psychology, physiology and anthropology had not revealed the extensive complexities of sexual behavior which have become part of our literature today.

Of course, since the decision in *Bridges* v. *California, supra,*[10] it has become immaterial to consider the extent of the English common law and the limitations which the common law applied to the freedom of the press. Suffice it to say that the greater limitations placed by the pre-Revolutionary English courts on that freedom have not been incorporated into our Constitution. But, even in England, the law had not considered published obscenity separately from matters generally offensive to the moral order of the Established Religion.[11] And it is obvious that the English rules concerning blasphemy are inapplicable in this country under the First Amendment. Indeed, they were long ago impliedly rejected by the New York Court of Appeals when it was asked to apply the predecessor of Penal Law Section 1141(1) to a publication deemed offensive to religion.[12]

While the subsequent English development of a common law rule need not be dealt with here, it should be remembered that English law and particularly the leading case of *Regina* v. *Hicklin,* L. R. 3 Q. B. 360 (1868), have in the past been

---

[10]pp. 263-268.

[11]*The Queen* v. *Read,* Fort. 98, 11 Mod. 142 (Q. B. 1708); *Rex* v. *Curl,* 2 Str. 789, 1 Barn. 29 (K. B. 1727); *Rex* v. *Wilkes,* 4 Burr. 2527 (K. B. 1770); Alpert, *Judicial Censorship of Obscene Literature,* 52 Harv. Law Rev. 40, 44-47 (1938) on the *Wilkes* case and the contemporary characterization of his *Essay on Woman* as "blasphemous"; see also Nobbe, *The North Briton* (1939), pp. 235-264. Cf. Grant and Angoff, *Massachusetts and Censorship,* 10 B. U. Law Rev. 146 (1930).

[12]*People* v. *Eastman,* 188 N. Y. 478 (1907).

relied upon by both our state and federal courts for assistance in defining obscenity.[13]

The *Hicklin* case construed the statute 20 & 21 Victoria c. 83(1), "The Campbell Act", applying it to a publication entitled "The Confessional Unmasked." Counsel conceded this work to be obscene and sought to justify it by the defendant's bona fide purpose to expose abuses in the Catholic Church. The statute had been enacted because of the inadequacy of the remedies afforded at common law, and the debates upon it in Parliament and the speeches of its sponsor, Lord Campbell, show that it was not directed at bona fide literature.[14] Rather was it aimed at pornography: at books manufactured and sold "with the intention of corrupting the public morals."[15] The Queen's Bench was not dissuaded, however, from extending the reach of the statute, and announced in an opinion by Lord Justice Cockburn that the test should be (at p. 371): "whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

The wisdom of this particular interpretation of the prohibition of obscenity has been severely and authoritatively criticized, but in our courts the attack upon Cockburn's formula has occurred principally in the field of statu-

---

[13]See *People* v. *Muller*, 96 N. Y. 408 (1884); *United States* v. *Bennett*, Fed. Case No. 14,571, 24 Fed. Cas. 1093 (S. D. N. Y., 1879).

[14]146 Hansard, *Parliamentary Debates* (3rd series, 1857), 327-332, 865, 1152ff.

[15]op. cit. p. 865.

POOR COPY

BLEED THROUGH

tory interpretation, and State power in this field has never been tested.[16]

This Court, nevertheless, recently stated, *Winters* v. *New York, supra,* p. 510, that the best of literature, equally with the "seemingly valueless magazines" there involved is subject to control if lewd, indecent, obscene or profane, citing *Ex parte Jackson,* 96 U. S. 727, 736 (1877) and *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942).[17]

These cases, however, do not answer the constitutional question here. In *Ex parte Jackson,* this Court, refusing a writ of habeas corpus to a petitioner convicted of sending lottery advertisements through the mails, denied that the prohibition to the mails of such matter, or, for example, of obscene matter, involved any abridgment of the freedom of the press.[18] The reason given was that other channels of distribution remained open.

In *Chaplinsky* v. *New Hampshire,* the application of a statute, narrowly drawn to prohibit publicly spoken words likely to cause a breach of the peace, was upheld. This Court did no more than deny, as it had in *Cantwell* v. *Connecticut, supra,* that epithets are entitled to constitutional protection. The opinion points out (at p. 572) that the utterance of some words, such as the lewd, obscene, profane and libelous,

---

[16] *United States* v. *Kennerley,* 209 Fed. 119 (S. D. N. Y., 1913); *United States* v. *One Book Entitled Ulysses,* 72 F. (2d) 705 (CCA 2, 1934); *United States* v. *Levine,* 83 F. (2d) 156 (CCA 2, 1936); *Parmelee* v. *United States,* 113 F. (2d) 729 (App. D. C., 1940).

[17] A similar statement appears without citation of authority in *Near* v. *Minnesota,* 283 U. S. 697, 716 (1931).

[18] But see *Hannegan* v. *Esquire,* 327 U. S. 146 (1946). No authority was cited in the *Jackson* case as supporting this dictum and that case was, of course, decided long before the formulation of the "clear and present danger" rule.

"which by their very utterance inflict injury or tend to incite to an immediate breach of the peace," have never been thought to raise a constitutional question.[19] It would seem clear that the attention of this Court in the *Chaplinsky* case was directed to a use of conversational expletives devoid of context which has no parallel in the present case, involving a serious and lengthy work of literature which entails the imaginative communication of ideas on a variety of important problems of man's existence in society.

While this Court in the *Winters* case, having made the statement above referred to, later proceeded (at p. 520) to suggest that the statutory language here involved is not so vague as to prevent effective notice of the crime it punishes, it reserved the question of the sufficiency of that language for a time when it could be measured by the principles of the First Amendment. The Court noted (at p. 518) that the word obscene and its variants are apt because "well understood through long use in the criminal

---

[19]Professor Chafee, on whose authority this Court relied for these statements, has since elaborated his views, 1 Chafee, *Government and Mass Communications* (1947) 59-60, 200-215. Professor Chafee (at pp. 212-213) warns of undue apprehension sometimes exhibited by "middle-aged judges and legislators" concerning books on sex. At another point in his work (pp. 59-60), he recognizes the constitutional issues inherent in obscenity cases involving bona fide literature, but would adapt the clear and *present* danger test so that the test would become "clear and *probable* danger." "Then," says Professor Chafee, "we would argue to a censor who wanted to ban a really good novel or play which, like *Measure for Measure* and the Book of Genesis, contains a few disturbing thoughts or words: 'Very likely, as you say, it would be very damaging to society if these passages were translated into illegal acts by many persons, but is it really likely that this will happen? Isn't the risk small enough to be worth running for the sake of giving the public the benefit of all the good material that the author has put into his work.' "

BLEED THROUGH POOR COPY

law." Nonetheless, as the Court of Appeals of New York said in its opinion in that case, *People* v. *Winters*, 294 N. Y. 545, 550 (1945): "Indecency and obscenity are not and never have been technical terms of the law and hence we are without any full or rigorous definition of the uses made thereof in the administration of justice."

The result then, is that non-rigorous definitions of the terms—even though perhaps well understood in some jurisdictions but certainly not well understood in New York—coupled with reluctance to appreciate the office of literature as an indispensable and honored agent for the communication of ideas,[20] has led to the indulgence of crippling limitations on the freedom of author and publisher lest, in the treatment of sex behavior, they utter an "expression beyond the conventions of the day."[21]

Non-rigorous definition of the term "obscene" has, however, been subject to telling criticism, most particularly perhaps in England, where the famous test of *Regina* v. *Hicklin*, *supra*, led to almost immediate challenge. Having stated the law as it was in his well-known *Digest of the Criminal*

---

[20]This problem has been stated and analyzed by Professor John Dewey in the last chapter of his *Art as Experience* (1934), an excerpt from which is printed in the appendix to this brief, p. 46.

[21]Mr. Justice Frankfurter, concurring, in *Hannegan* v. *Esquire*, 327 U. S. 146, 159, 160. Chief Judge Learned Hand years ago in *United States* v. *Kennerley*, 209 Fed. 119 (S. D. N. Y., 1913), formulated what has recently been termed "perhaps the most useful definition of obscene," *Parmelee* v. *United States*, 113 F. (2d) 729 (App. D. C., 1940). The premise of this formulation, although it was evolved in a case in which the constitutional point was neither raised nor considered, challenged the breadth of the *Hicklin* rule, *supra*, upon the ground that society was not "prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members."

*Law*, Sir James Fitzjames Stephen, went on to state what he thought it should be:

> "A person is justified in exhibiting disgusting objects, or publishing obscene books, papers, writings, prints, pictures, drawings, or other representations, if their exhibition or publication is for the public good, as being necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest; but the justification ceases if the publication is made in such a manner, to such an extent, or under such circumstances, as to exceed what the public good requires in regard to the particular matter published."[22]

Stephens' statement is not without parallel in the statements of distinguished literary scholars and artists who, while not venturing constitutional or legal analysis, have contended that the maximum restraint on letters should go no further than to outlaw commercial pornography. Criticism of the crippling effect on literature of laws which set the conception of obscenity virtually at large, so that it can be applied to harmonize literature with particular judicial taste, has been effectively made by many writers who have not themselves sought to use the full freedom of discussion which they believe essential to a vigorous and free literature.[23]

---

[22]Stephen, *Digest of the Criminal Law* (1877) 105. That this view is highly regarded in England appears from the fact that it was recently included in a charge to a jury in an obscenity case, *Rex* v. *DeMontalk*, 23 Crim. App. Rep. 182 (1932).

[23]In the appendix to this brief are reprinted excerpts from comments by the noted novelists and critics Virginia Woolf and E. M. Forster, and by the distinguished American literary scholar

POOR COPY

BLEED THROUGH

Not only, however, is freedom in the treatment of sex behavior, or any other important factor in human life, essential to the advancement of the literary arts, and not only is freedom in the treatment of any subject squarely within the unequivocal command of the First Amendment, but, also, neither reason nor authority suggests that the broad command can be considered to be inapplicable to any particular subject of interest or comment.

**d. The statute here has been neither narrowly drawn nor narrowly construed to punish specific conduct.**

The foregoing portions of this brief have been devoted to a showing that the First Amendment may not be read as excluding from its protection utterances on any single subject. Leaving aside the occasional unsupported dicta, it has never been held by this Court that different constitutional standards are to be applied to discussions of sex than have been uniformly applied to discussions of other subjects.

We have also advanced the suggestion that reversal here would not require a holding that the statute in question is invalid on its face. It is therefore appropriate to consider whether the statute has been so narrowly construed and applied as to measure up to the stringent standards fixed by this Court in the development of the "clear and present danger" rule.

Clearly, the statute upon its face is not narrowly drawn. In the broadest possible terms it simply denounces written

---

William Allan Neilson. For a discussion of the problem from a more philosophical viewpoint, see also Professor F. H. Bradley of Oxford, *On the Treatment of Sexual Detail in Literature*, 2 *Collected Essays* (1935), 619.

obscenity. Since the courts below wrote no opinion in this case, we must look to other expressions of the New York State courts to determine just what definitions and boundaries are to be read into the statute. Interpretations by the State courts put the words of those courts into the statute as definitely as if it had been so amended by the legislature. *Winters* v. *New York*, 333 U. S. 507, 514.

It may be said at the outset that such expressions of the State courts, taken either singly or as a whole, lead to three conclusions. First, that the case law of New York does not narrow the broad words of the statute in any appreciable degree, and therefore the statute as construed in other cases does not meet the constitutional standard fixed by this Court.

Second, a reading of a number of the opinions of the State courts leaves the definition of the statute in a state of such confusion as to give rise to doubt that any definition can be confidently relied upon. While some expressions would lead one to believe that the statute is designed to protect only the young and immature, others speak broadly of the corruption of the morals of the entire public. While some place emphasis on the lack of literary merit, others suggest that literary merit is entirely immaterial. Although exceptions in favor of scientific and of literary works have been suggested, they have been so inconsistently applied as to make the exceptions almost valueless.

Third, "The crucial question is not the formal interpretation of the statute" by the State courts "but the application given it." *Herndon* v. *Lowry*, 301 U. S. 242, 260. In its application here, the offense made criminal is that of publishing and selling a bona fide work of literature which in a few passages contains explicit descriptions

POOR COPY

BLEED THROUGH

of sexual acts. In our view such a construction and application is invalid.

Turning now to specific decisions of the State courts, we find among the earliest *People* v. *Muller,* 96 N. Y. 408 (1884), which involved an indictment for the sale of obscene photographs. The court there said (at pp. 410-411):

> "It is to be observed that the statute does not undertake to define obscene or indecent pictures or publications. But the words used in the statute are themselves descriptive. They are words in common use, and every person of ordinary intelligence understands their meaning, and readily and in most cases accurately applies them to any object or thing brought to his attention which involves a judgment as to the quality indicated. * * * It is evident that mere nudity in painting or sculpture is not obscenity. Some of the great works in painting and sculpture as all know represent nude human forms. It is a false delicacy and mere prudery which would condemn and banish from sight all such objects as obscene, simply on account of their nudity. If the test of obscenity or indecency in a picture or statue is its capability of suggesting impure thoughts, then indeed all such representations might be considered as indecent or obscene. The presence of a woman of the purest character and of the most modest behavior and bearing may suggest to a prurient imagination images of lust, and excite impure desires, and so may a picture or statue not in fact indecent or obscene.
>
> "The test of an obscene book was stated in *Regina* v. *Hicklin* (L. R., 3 Q. B. 369), to be, whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences, and who might come into

> contact with it. We think it would also be a proper test of obscenity in a painting or statue, whether the motive of the painting or statue, so to speak, as indicated by it, is pure or impure, whether it is naturally calculated to excite in a spectator impure imaginations, and whether the other incidents and qualities, however attractive, were merely accessory to this as the primary or main purposes of the representation."

and (at p. 413):

> "We do not doubt that whether a publication is obscene or not may in some cases depend on circumstances. For example, a medical book for the instruction of medical men may contain illustrations suitable and proper as a part of the work, but which, if detached, and published only for circulation, might be deemed indecent within the statute."

It is difficult to determine from the *Muller* opinion whether the rule in *Regina* v. *Hicklin* was intended to be applied in New York. The *Hicklin* case had set up the standard of tendency to corrupt and had expressly rejected any consideration of the motive of the author. The *Muller* case, while citing the *Hicklin* case with apparent approval, placed emphasis on motive and suggested that tendency to corrupt might be immaterial under certain circumstances.

In the subsequent case of *People* v. *Eastman*, 188 N. Y. 478 (1907), the court, however, seems to have relapsed. It made no reference to the *Muller* case, and Chief Judge Cullen, concurring, said (at p. 480): "From the context of the statute it is apparent that it is directed against lewd, lascivious and salacious or obscene publications, the tendency of which is to excite lustful and lecherous desire."

POOR COPY

BLEED THROUGH

And (at p. 481): "The truth or falsity of the writing has no bearing on the guilt or innocence of the defendant under this section of the Code."

But the *Eastman* case was, after all, really a prosecution for blasphemy, and the words of the Chief Judge may perhaps be regarded as dicta, although, in fact, they bore directly upon the issue then before the court. Be that as it may, the Chief Judge's words were quoted in *People* v. *Brainard*, 192 App. Div. 816 (1920), when a conviction for publication of an autobiography of a prostitute was reversed because the book contained not "a single word or picture which tends to excite lustful or lecherous desire." It should also be noted that the reversal of the conviction there took place in spite of the fact that the court found that the book taught no "moral lesson."

The next decision deserving mention is *Halsey* v. *New York Society*, 234 N. Y. 1 (1922), from which it first appeared that literature—like medical works—was entitled to special protection. It was there held in a civil action for malicious prosecution that the book "Mademoiselle de Maupin," by Theophile Gautier gave no probable cause for its prosecution as an obscene book. A magistrate had dismissed a complaint against Halsey, who had been charged with selling the book, and a jury had held the Society for the Suppression of Vice liable in damages for having prosecuted him.

The Court of Appeals held the book not obscene in spite of the fact that it contained many paragraphs which, taken by themselves, were "undoubtedly vulgar and indecent." The record of the trial reveals not only that the book contained bedroom scenes considered by the trial court to be "lecherous", but also that it was most forcefully argued that

the book counselled vice, including a statement by the narrator of the story that: "Adultery appears to me the most innocent thing in the world. I deem it quite a simple matter that a young girl should prostitute herself" (*Halsey* Record on Appeal, fols. 113-128). To this, the Court of Appeals said (at p. 4):

> "No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar selection from Aristophanes or Chaucer or Boccaccio or even from the Bible. The book, however, must be considered broadly as a whole. So considered, critical opinion is divided."

The court then went on to take judicial notice of and to consider critical opinion concerning the work and its author. The fact that critical opinion was not unanimous and that some referred to the book as "pornographic and dull," did not prevent the court from holding that the book did not run afoul of the statute.

The next case in chronological order was *People* v. *Pesky*, 230 App. Div. 200; aff'd. 254 N. Y. 373 (1930). That was a prosecution against the unlawful possession of "Hands Around", which was a book avowedly "intended for private circulation only" and presented as a group of "studies in the etiquette of the liaison and all its nuances." The book professed to deal with the "exquisite handling of the licentious" and boasted that "All stratagems of sex are uncovered." The Appellate Division, in affirming a conviction, noted that there had been no claim that the book was of any value as a literary production or as an intellectual treat. "There was no attempt to point to any lesson that might be

POOR COPY

BLEED THROUGH

of value to anyone who would read it. It was just a clear attempt to portray filthy ideas, for the book is without a single redeeming feature." In the *Pesky* case, we see the courts examining into the literary merit of the book and the lesson taught. But when the case reached the Court of Appeals, it affirmed simply upon the ground that it was not a trier of the facts and that the lower courts might have reasonably concluded that the book was obscene beyond a reasonable doubt. It held that the book was not "so innocuous as to forbid the submission of its quality to the triers of the facts."

Still later, under an analogous statute, the Court of Appeals did not feel bound by a lower court finding of obscenity when it reversed the convictions in *People* v. *Wendling,* 258 N. Y. 451 (1932). There the prosecution was directed at the staging of the play "Frankie and Johnnie". Although the court thought the language of the play was coarse, vulgar and profane and the plot cheap and tawdry, and that the play tended to degrade the stage and was indecent from the point of view of propriety, the court refused to act as a censor or to regulate manners, saying (at p. 453): "One may call a spade a spade without offending decency, although modesty may be shocked thereby. (*People* v. *Muller,* 96 N. Y. 408, 411.)" In answer to the argument that the play tended to corrupt the morals of youth, the court said: "Here again the question is not whether it would tend to coarsen or vulgarize the youth who might witness it but whether it would tend to lower their standards of right and wrong, specifically as to the sexual relation." And further: "The play may be gross and its characters wanting in moral sense. It may depict women who carry on a vicious trade and their male associates. It cannot be said to suggest, except 'to a prurient imag-

ination,' unchaste or lustful ideas. It does not counsel or invite to vice or voluptuousness. It does not deride virtue."

Since "Mademoiselle de Maupin" contained language counselling vice and deriding virtue, one might have thought that the test of tendency to corrupt had at last been abandoned. The *Wendling* case, however, marked a retrogression in tolerance when it endorsed a test of obscenity, including tendency to lower standards of right and wrong, inviting to vice or voluptuousness and deriding virtue. The *Wendling* case is, however, significant because of the fact that the Court of Appeals did not feel bound to affirm a conviction by the Court of Special Sessions simply because the latter was the trier of the facts.

The lower State courts appear to have continued the progress toward greater tolerance of bona fide literature. It should be noted that these lower court decisions were not appealable since they dismissed criminal proceedings, and therefore they are decisions of the highest courts which had the authority to pass upon the question. Thus, in *People* v. *Viking Press, Inc.*, 147 Misc. 813 (1933), a City Magistrate refused to issue a complaint against "God's Little Acre" by Erskine Caldwell. The Magistrate acted upon the authority of the *Muller, Halsey* and *Wendling* cases, saying that (at p. 814): "The statute is aimed at pornography, and a pornographic book must be taken to be one where all other incidents and qualities are mere accessories to the primary purpose of stimulating immoral thoughts. The courts have strictly limited the applicability of the statute to works of pornography and they have consistently declined to apply it to books of genuine literary value. If the statute were construed more broadly than in the manner just indicated, its effect would be to prevent altogether the realistic

POOR COPY

BLEED THROUGH

portrayal in literature of a large and important field of life. The Court of Appeals has consistently frowned upon such an interpretation of the statute." In reaching its decision, the court took cognizance of literary reviews and of the fact that the book contained internal evidence that it was written with a sincere attempt to present with truth and honesty a segment of life in a part of the United States.

Similarly, in *People* v. *Miller,* 155 Misc. 446 (1935), a City Magistrate held the book "November", by Gustave Flaubert, to be not obscene. In dismissing the complaint, the court said (at pp. 447-448): "The obscenity statute was not intended to suppress *bona fide* literary effort but rather to prohibit the exploitation of smut—dirt in the raw (*People* v. *Wendling,* 258 N. Y. 451, at p. 453; *United States* v. *One Book Called 'Ulysses,'* 5 Fed. Supp. 182, 183; affd., 72 F. [2d] 705.)"

Shortly before the decision in the *Miller* case, the Appellate Division had passed on an unidentified book and had held it to be obscene, *People* v. *Berg,* 241 App. Div. 543 (1934); affd. 269 N. Y. 514 (1935). There the test again was whether the book had literary merit, whether it taught a lesson or pointed a moral, and whether it told a story concerning any actual characters or era. Since, in the court's judgment, the book failed to pass any of these tests, it was held obscene. As late as 1934, we find the Appellate Division saying (at p. 544):

> "Chiefly, judicial opinions in such cases have dealt at length with books determined not to be obscene, with no clear standard given for determining obscenity and indecency. But from those opinions where a clean certificate of character has been given to questioned books there does emerge, somewhat hazily, the rule that an obscene book is one that 'tends

> to corrupt the morals of youth,' or 'to lower the standards of right and wrong specifically as to the sexual relation.' To be deemed obscene it must show 'sexual impurity' and result in 'the exciting of lustful and lecherous thoughts and desires' or tend 'to stir sex impulses or to lead to sexually impure thoughts.' The application of these standards in any particular case must in large measure depend upon the enlightened and discriminating reaction of the judicial mind."

The affirmance of the Court of Appeals was without opinion.

Almost simultaneously, the Appellate Division of another Judicial Department was deciding *People* v. *Fellerman*, 243 App. Div. 64 (1934); affd. 269 N. Y. 629 (1936). There the court held a magazine to be obscene because it contained indecent and obscene pictures of persons in nudist camps and colonies engaged in nudist activities. Answering the argument that the magazine was sincerely fostering the nudist movement by means of educational text and photographs, the Court there said (at p. 65):

> "What the real intent of the publisher may be we cannot say. We know from the record in this case that the magazine was placed on sale to the general public where it could have been purchased by the young as well as the old, and a charge of twenty-five cents was made for it. We are naturally constrained, therefore, to adopt the view that there was a mercenary motive underlying its publication and sale. * * * We would say of it, that it tends 'to lower the standards of right and wrong,' that it offends against modesty, and that it is subversive of morality."

Here, again, the affirmance of the Court of Appeals was without opinion.

POOR COPY

BLEED THROUGH

Also contemporaneous with the decisions just discussed was the decision in *United States* v. *One Book Entitled Ulysses*, 72 F. (2d) 705 (1934), in which Judge Augustus N. Hand rejected the test of tendency to promote lustful thoughts and suggested that "the same immunity should apply to literature as to science, where the presentation, when viewed objectively, is sincere, and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication. The question in each case is whether a publication taken as a whole has a libidinous effect. The book before us has such portentous length, is written with such evident truthfulness in its depiction of certain types of humanity, and is so little erotic in its result, that it does not fall within the forbidden clause" (at p. 707).

And Judge Hand continues (at p. 708):

> "In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content."

We mention the *Ulysses* case here because Judge Hand's opinion bears evidence of his belief that his decision was in accord with New York law. It will be recalled that in 1934, in the *Berg* case, the Appellate Division was still applying the "hazy" *Hicklin* doctrine, i. e., that a book is obscene which "tends to corrupt the morals of youth" and was testing the book by the reaction of the enlightened judicial mind. And the Court of Appeals had affirmed the decision in the *Berg* case without opinion. But other respectable authority was at the same time reading the *Halsey* case as having

definitely overruled the *Hicklin* doctrine, *United States* v. *Levine*, 83 F. (2d) 156 (1936). In that case, Chief Judge Learned Hand interpreted the *Ulysses* case as having followed the *Halsey* case, which in turn, according to Chief Judge Hand, had overruled the *Hicklin* doctrine.

Justice Perlman, who dissented from the decision of the trial court in the case at bar, had been a City Magistrate in 1936 and as such had had occasion to pass upon André Gide's autobiography, *People* v. *Gotham Book Mart, Inc.*, 158 Misc. 240 (1936). In spite of the many words which had then already been written concerning the meaning of the word "obscene" under the New York statutes, Justice Perlman could find no clear and unmistakable test to be applied. However, after reviewing the *Muller, Halsey, Viking Press, Berg* and *Ulysses* cases, he framed the following test (at p. 244):

> "Whether or not, recognizing the latitude afforded all works of literature and of art, and that tastes may differ, a reasonable, cautious and prudent man environed with the conditions of life as they exist today, and not in some past age, would be justified in believing that the book was obscene and lewd not in certain passages, but in its main purpose and construction and published for no useful purpose, but simply from a desire to cater to the lowest and most sensual part of human nature?"

The cases already reviewed and several others led one commentator (Alpert: *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40, 64) to say, in 1938, that "the New York law is a very welter of dissonances". Mr. Alpert summarized the rule as "the orthodox test for obscenity: whether the tendency of the matter charged is to deprave and corrupt those whose minds are open to such

POOR COPY

BLEED THROUGH

immoral influences and into whose hands the matter might fall. To this, however, are added four apparently subsidiary tests: whether the book lacks literary merit; whether it teaches a lesson or moral; whether it describes a period of history and the people and customs of that time; whether the story is true or representative of any individual or class."[24]

In any event, there is now grave doubt as to whether Chief Judge Learned Hand, Justice Perlman, Mr. Alpert or anyone else has succeeded in correctly reading the law of New York. For, in 1945, the Court of Appeals, in *People* v. *Winters*, 294 N. Y. 545, framed a test even more elusive and difficult, if not impossible, to apply (at p. 551):

> "In the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order. Consequently, a question as to whether a particular publication is indecent or obscene in that sense is a question of the times which must be determined as a matter of fact unless the appearances are thought to be necessarily harmless from the standpoint of public order or morality."

This appears to be the first time that the test has been framed in terms of the likelihood of bringing about the corruption of the morals of all the public, and in terms of whether "appearances are thought to be necessarily harmless." Entirely apart from any question of the confusion which exists with respect to the rule, it now seems that the New York courts look to the "tendency" or to the "likelihood" of injury. And such tests are the very ones which

[24]But see *People* v. *Eastman*, 188 N. Y. 478, 481, *supra*.

COPY BOUND CLOSE IN CENTER

this Court has repeatedly rejected in First Amendment cases. Under "a law general in its description of the mischief to be remedied and equally general in respect of the intent of the actor," the standard of guilt may not be made the "dangerous tendency" of his words. *Herndon* v. *Lowry*, 301 U. S. 242, 258. Whether the Constitution protects the right to publish, must, under the cases, depend not upon remote tendency or likelihood, but upon clear, serious, imminent danger. And no such danger from the publication now before the Court has ever been claimed or established.

Only those with little faith in the sturdiness of public taste or the moral fibre of literate readers could find the slightest danger in such a book. There is no basis whatever for assuming that the book would find wide circulation among the young, who are not notable for avid interest in fiction written by distinguished literary critics. But only a very low opinion of the good sense of the young would give rise to any fear that this book would stimulate to immorality. Such imaginary dangers, conjured up by excessive timidity, are not the sort which justify denial of constitutional protection. Literature is not to be shackled because some few individuals may perhaps demean their literacy.

Throughout the instant litigation, as it proceeded through the State courts, the appellant urged that under the decisions of the appellate State courts no bona fide work of literature had ever been held to violate section 1141(1). The State, on the other hand, has consistently urged that the test is the test of the *Hicklin* case, i.e., whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences and who might come in contact with it. The dissenting justice in the trial court was still of the opinion, as he had been in 1936, that, generally speaking, the *Ulysses*

POOR COPY
BLEED THROUGH

rule was the one to be applied (R. 47-48), but, in spite of the unsettled state of the law, the New York courts wrote no opinions and therefore shed no light as to the test which was applied to the book now being considered.

In this respect, the case is like *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), in which the finding against the petitioner was a general one and did not specify the testimony upon which it rested. There, as here, the charges were framed in the words of the statute and had to be given a construction which had been put upon the statute by prior State decisions. Here the prior State decisions have given no evidence of any recognition that the "clear and present danger" rule was the one to be applied. Thus, as in the *Thornhill* case, there is no evidence that the statute aims specifically at evils within the allowable area of State control. Nor, indeed, are the evils themselves sufficiently defined or identified. "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview" (310 U. S., at pp. 97-98).

If the abuses created by loud-speakers can be controlled by narrowly drawn statutes, *Saia* v. *New York*, 334 U. S. 558, 562 (1948), so can the evils in commercial pornography be likewise controlled. The *Thornhill* case makes it clear that there is no burden on the appellant to demonstrate that the State could not constitutionally have written a different and specific statute covering its activities as disclosed by the charge and the evidence introduced against it. Its burden is simply to show that the statute construed and here applied, as it has been—in terms of tendency and of likelihood, in

COPY BOUND CLOSE IN CENTER

terms which measure its literary merit, in terms which test the truth of the contents of the publication—cannot survive an attack made upon the ground that, in this case, as so construed and applied, it violates the First Amendment. That is a burden which, we submit, the appellant has here sustained.

## Conclusion

When the Court considers this book and the circumstances of its publication as a serious literary work, as it must, it will find, as it recently did in *Craig* v. *Harney*, 331 U. S. 367 (1947) and other cases, that no clear and present danger justifies the suppression which is involved in the conviction below. No genuine peril to the State justifies the conviction. The real peril to the State is in suppressing ideas and the right of free expression. The Constitution creates an atmosphere in which the arts can flourish, not one in which they are in constant danger of being stunted by the timid pruning of censors. The whole course of decisions under the First Amendment in recent years shows that the conviction below cannot be allowed to stand.

**The judgment should be reversed.**

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
*Counsel for appellant.*

GEORGE G. GALLANTZ,
JAMES F. DWYER,
NEWELL G. ALFORD, JR.
*of Counsel.*

September 30, 1948.

POOR COPY
BLEED THROUGH

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 5 1948
CHARLES ELMORE CROPLEY
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1948

No. 11

DOUBLEDAY & COMPANY, INC.,
*Appellant,*

*vs.*

THE PEOPLE OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

## APPENDIX TO APPELLANT'S BRIEF

BLEED THROUGH

POOR COPY

# Index


PAGE

Collection of Literary Reviews of "Memoirs of Hecate County"

*United States Quarterly Book List*, September, 1946
Quotation from flyleaf ..... 1
Literary review ..... 2

*New York Times*, March 7, 1946 ..... 4
Reviewed by Charles Poore

*New York Herald Tribune*, March 10, 1946..... 7
Reviewed by Richard Match

*Time*, March 25, 1946..... 11

*Saturday Review of Literature*, March 23, 1946... 14
Reviewed by Harrison Smith

*Knickerbocker Weekly*, July 22, 1946..... 17
Reviewed by Dola DeJong

*New Republic*, March 25, 1946..... 22
Reviewed by Malcolm Cowley

*Tomorrow*, June, 1946..... 27
Reviewed by John Richmond

*Partisan Review*, Summer, 1946..... 29
Reviewed by Alfred Kazin

Jefferson's letter to N. Dufief..... 37

Excerpts from Jefferson's Works, Remarks on Freedom of the Press ..... 39

Excerpt from Tucker's Appendix to Blackstone..... 41

Excerpt from Ingersoll's Address ..... 43

Excerpt from Dewey, *Art as Experience*..... 46

Excerpt from Article by Virginia Woolf..... 49

Excerpts from Articles by Forster ..... 51

Excerpt from Article by Neilson ..... 53

BLEED THROUGH

POOR COPY

## THE UNITED STATES QUARTERLY BOOK LIST

**Vol. 2, No. 3, September, 1946**

[The nature and origin of the United States Quarterly Book List is described in the following excerpt from page iii of the September, 1946 issue]

The *United States Quarterly Book List* has its origin in a recommendation of the Inter-American Conference for the Maintenance of Peace, held in Buenos Aires in 1936. The substance of this recommendation is that each American republic issue a quarterly bulletin, giving notice of recently published books of a scientific, historical, literary, or artistic nature, to be distributed and exchanged among the republics by suitable government agencies.

A book is here defined as a bound volume of one hundred or more pages. Exceptions as to minimum length may be made, especially for volumes of poetry and for concise tools of reference and research. Only books published originally in the United States and available for general distribution are eligible for inclusion. Since the purpose of the *Book List* is to make known the current literary, learned, and scientific contributions of the United States, certain classes of books are more or less automatically excluded. These classes are: light fiction, juveniles, work and craftbooks and manuals, textbooks, translations, reprints, and periodicals as distinguished from serials. Provision is made, however, that individual items of outstanding merit in these classes may be considered for inclusion on the basis of their contribution to art, literature, the sciences, or technology.

The information concerning each book listed includes a main entry, an annotation primarily descriptive of the contents of the book, and, where information is available, a biographical sketch of the author, intended to place him in relation to his field and to the particular book listed. The

form of entry is adapted from the Library of Congress catalog card, giving author and title, imprint, collation, price, and Library of Congress card number.

The *Book List* is issued in March, June, September, and December. The March issue, which is Number 1 of the volume, lists books published during the quarter ending December 31 of the preceding year; the three succeeding numbers of the volume list books published during the three succeeding quarters. Books received after the close of the quarter to be covered by any number of the *Book List* will be considered for inclusion in the following one.

Contributors to each issue of the *Book List* are listed by name and occupation or institutional affiliation, but because the Library of Congress assumes full responsibility for all material appearing in the *Book List*, the annotations are unsigned.

The *Book List* is broad in scope, is highly selective, and conversely is neither comprehensive nor exhaustive. It is intended to be useful to persons wishing to keep abreast of current contributions of the United States in the fields of the fine arts, literature, philosophy and religion, biography, the social sciences, the biological sciences, the physical sciences, technology, and reference.

[The following is from pages 183-184 of the September, 1946 issue under the heading "Literature", sub-heading "Novels and Tales."]

Wilson, Edmund. Memoirs of Hecate County. Garden City, N. Y., Doubleday. 338 p. 20 cm. $2.50. 46-2116.

Described on the dust jacket as "fiction," these loosely related chronicles bear internal evidence that they are to some extent reflective and critical autobiography. All have in common characters summering in Hecate County, an imagined well-to-do suburban colony near New York.

Although all the pieces have the style of the polished and subtle raconteur, the tone and subject matter vary from social reporting to fantasy. Consequently, the reader

POOR COPY

BLEED THROUGH

may at times find himself speculating upon the sources of Mr. Wilson's data instead of devoting himself to the book as a work of art. Three of the stories have been published before. Of these, The Man Who Shot Snapping Turtles tells of a sinister esthete who descends from campaigning to protect ducks as object of beauty to exploiting their natural enemies, snapping turtles, for financial gain. In Ellen Terhune, the character of a woman composer is discovered and accounted for through the fantasy of visits into her family past.

Of the new sketches, The Princess with the Golden Hair fulfills best the statement of the jacket—"the adventures of an egotist among the bedeviled." Essentially, this is a story of seduction, disappointment, and failure, upon the part of the egotist, to face up to any reality when his ideals collapse. The contrast between Imogen, the princess, and Anna, the proletarian, is perhaps too doggedly pursued; the seduction scenes are purposely almost clinical in their physical detail. The total effect of the story, however, derives from the self and social analysis, more courageous than smug.

The Milhollands and Their Damned Soul is a knowing satire on the industrialization of publishing, and its ramifications in book selection clubs, book reviewing, and advertising. As a whole, the MEMOIRS satirize a relatively small but influential group who consider themselves an intellectual and cultural elite.

Wilson, Edmund. Born 1895. Educated at Princeton University, A. B., 1916. Member of staff, *The New Yorker*. Publications: I Thought of Daisy, 1929; Axel's Castle; a study in the imaginative literature of 1870-1930, 1931; To the Finland Station; a study in the writing and acting of history, 1940; and other works.

COPY BOUND CLOSE IN CENTER

**THE NEW YORK TIMES**

**March 7, 1946**

BOOKS OF THE TIMES

BY CHARLES POORE

"Memoirs of Hecate County,"* by Edmund Wilson, the most perceptive and informed and implacable of contemporary American critics, is a tortured and tortuous book. It is a pastiche of fragments that might have been a novel if the symbolic and the realistic passages had ever met. Instead, it is a disjointed sequence of murky, suburban-Gothic tales about members of one wing of the Scott Fitzgerald generation growing more frustrated and more bedeviled and more garrulous about their woes and the state of the world, and they head for the last crack-up and time goes hopelessly on.

The clarity and force of Mr. Wilson's criticism seem to vaporize when he starts to tell a story. In place of narrative we get essays—sometimes very fine essays—and case histories—sometimes rather clinical case histories, as in the tasteless love scenes—and allegories, but disappointingly little life. The hero of this story, a middle-aged writer on art and economics, is a priggish amorist and blood brother to T. S. Eliot's J. Alfred Prufrock. His three loves are more at ease in their parts as charades of the proletariat, the bourgeoisie and the heedless leisure class than as human beings. It is obvious that Mr. Wilson has spent infinite pains in trying to make them real. But how can they be real when they have to spend so much time symbolizing things?

It is hard to understand why Mr. Wilson the critic allows Mr. Wilson the story-teller to clutter up his tales with so much irrelevant or disparate material. It may be just

*Memoirs of Hecate County. By Edmund Wilson. 338 pages. Doubleday, Doran. $2.50.

POOR COPY

BLEED THROUGH

for the fun of it; just for the pleasure of talking about left-wing movements, advertising, publishing, and so on; just for the interest he has found in drawing-room sleight-of-hand and library research in magic. Or it may be because he is fundamentally a moralist, first, last and all the time, even when he is writing scenes decidedly not meant for children, relentlessly bent on searching everywhere for what is wrong with human beings and their world.

At any rate, in "Memoirs of Hecate County" he alternately belts his burdened characters with supernatural diabolism and economic materialism. This is a novel mixture. Under the treatment the characters generally emerge bloody or somewhat bowed, when they emerge at all. Some are killed off, some are preserved for special, earthly limbos. If Marx doesn't get them, the devil will.

The devil has a field day in suburbia. The main scene of the story (when it is not Manhattan Island) is in the countryside somewhere on the commuters' cocktail circuit near New York. Outwardly it is realistic down to the last croquet set. But it is also obviously named for Hecate, that three-headed goddess of black magic, nightmares and the underworld of whom Macbeth spoke feelingly when—after inquiring whether it was a dagger that he saw before him—he went on to remark that:

> *Now o'er the one-half world*
> *Nature seems dead, and wicked dreams abuse*
> *The curtain'd sleep; now witchcraft celebrates*
> *Pale Hecate's offerings . . .*

The first three tales in Mr. Wilson's undertaker's garland for the less beautiful than damned (they first appeared in The Atlantic Monthly, Partisan Review, and Town and Country) set the mood by stages. "The Man Who Shot Snapping Turtles" is more entertaining as an illustration of rugged enterprise (he built up quite a business of canning them) than of more mysterious matters. "Ellen Terhune" presents a Jamesian venture into the past, with added lec-

COPY BOUND CLOSE IN CENTER

tures on music, as we are led backward into her childhood and antecedents. "Glimpses of Wilbur Flick" belabors charlatanism in various contemporary forms.

All these are very elementary exercises compared to the last three stories, "The Princess With the Golden Hair," "The Milhollands and Their Damned Soul" and "Mr. and Mrs. Blackburn (also Malatesta, Chernokhvostov and Swarzkopv) at Home." These form the substance of the black-magic parables and contrasting loves and hates we have been discussing. They bulge with so much symbolism that, like Joyce's "Finnegans Wake" they need a key; like Eliot's "The Waste Land" they need explanatory notes. When a character wears a crescent moon in her hair or shows fangs you can see that good old Hecate and her people are about, but the devil turns up in so many guises that at least a pocket guide should be supplied. We wish the devil were as simple as he was when he first appeared to Amory Blaine in "This Side of Paradise."

By way of relief, there are familiar scenes that remind you of the plays S. N. Behrman used to write in the Nineteen Thirties, in which themes of rugged social significance used to be discussed against backgrounds of rather plush social decor. In the same way Mr. Wilson can do a standard-brand parody of the "lit'ry" life as easily as Tom Wolfe or Tess Slessinger.

It is when he starts collaborating with Proust, Joyce, Freud, Marx, Henry James, Scott Fitzgerald and the historians of the Greek and Roman mythologies, all at the same time, that we want to ask Edmund Wilson the critic to step in and straighten out Edmund Wilson the story-teller.

POOR COPY

BLEED THROUGH

**NEW YORK HERALD TRIBUNE**

**March 10, 1946**

## Mr. Wilson's Six Ironic and Satirical Tales

Memoirs of Hecate County. By Edmund Wilson. 338 pp. New York: Doubleday and Company. $2.50.

Reviewed by Richard Match.

There are 3,100 counties in the United States, none of which is named Hecate. Hecate County and its inhabitants belong in the category whose resemblance to real places and persons is said to be entirely coincidental—but seldom is. They provide setting, atmosphere, and cast for the six longish stories that Edmund Wilson, book reviewer of "The New Yorker", has included in these "memoirs".

Hecate County is the rainbow land at the end of the Sawmill River (or Merritt) Parkway, dotted with the rococo week-end palaces of traction magnates and the Tudor-modern villas of New York advertising men. Its curious name, we are told, was merely one of those classical revivals, like Syracuse and Ithaca, which early Americans were so fond of—Hecate having been the Greek goddess of law courts, animal husbandry, the infernal regions, and divers other jurisdictions. The reader with a Britannica handy will know that the Romans called her Trivia and will suspect that Mr. Wilson's choice was no accident.

The author's protagonist, the "I" of all six stories, is one of Hecate County's lonely intellectuals; an ineffectual young man with an independent income who had called himself a Socialist at college and was now, in the years before and after 1929 writing a book on art and its social-economic roots. Around this formidably erudite person, the narrator of four stories and the leading character of two, there revolves a world of gay suburbanites drinking Prohibition cocktails to the way of life that would, fifteen years later, be so rudely disturbed by the United Nations Organization site-selection committee. In the Hecate cosmos of paunchy

Yale men and their chatelaines, he wandered restlessly, attending monumental summer soirees that recall the heyday of Jay Gatsby and F. Scott Fitzgerald, surrounded by "great quantities of tan-backed girls and scarlet-faced men, with highballs fizzing in their hands."

All these people considered Mr. Wilson's hero "brilliant", and enough of them unburdened to him the emotional woes of Hecate County living to make half a dozen ironic parables of our time. Asa M. Stryker was the first, in a story called "The Man Who Shot Snapping Turtles". Stryker was a former professor whose pet ducks were being decimated by hungry snapping turtles. The situation assumed a religious aspect for him: Good (the ducks) versus Evil (the snappers). Baffled, Stryker decided to exploit the evil he could not eradicate, began to breed turtles commercially, marketed "Snapper Consomme", made a fortune and in time came to grief—as must all men "who encourage the breeding of snapping turtles."

Less moral but equally ironic are "Glimpses of Wilbur Flick" and "The Milhollands and Their Damned Soul."

The former is a simple bit of ideological sarcasm, being the story of a wealthy misfit's efforts to find a place for himself in the social scheme. After vainly seeking solace in the Catholic Church, the native Fascist movement, alcohol, narcotics and psychoanalysis, Wilbur Flick found happiness in the Communist party. The party was, for him, "a kind of exclusive club which was soon to dominate the world."

Book-Reviewer Wilson's satirical talents, ordinarily suave, break loose into the realm of savage caricature when he starts to talk shop. His story of the literary brothers Milholland will produce some very red ears along Publishers' Row. Jim Milholland was the editor of "Booklover"; Warren headed the selection committee of the nation's biggest book club; Spike broadcast radio reviews of fat new novels, each week announcing the appearance of "the American Tolstoy" or "the American Jane Austen."

POOR COPY

BLEED THROUGH

The Milhollands, in short, derived upper-bracket incomes from "the simple commercial processing of words." Mr. Wilson's subversive inside view of the "book industry," the machinery that builds best sellers with Willow Run efficiency, is capable of rocking bookish circles in Hecate and adjoining counties more than anything since the death of William Lyon Phelps.

Less successful are two other stories in which, the narrator tells us, he has "carried so much of dreaming into real life . . . that I was not always quite sure which was which." The reader may be in the same boat. In one of these stories, Mr. Wilson has written a dozen pages of dialogue in uninterrupted French, for no reason that this startled reviewer could discern.

The major episode of the Hecate County memoirs is "The Princess With the Golden Hair," which occupies about half the book and might easily have been published as an independent novel. It concerns the narrator's dual amatory involvement with a blonde Hecate matron and a proletarian girl from Brooklyn. Imogen Loomis was the golden-haired princess, the beautiful but neurotic wife of an advertising man; though happily married, she liked to indulge in extracurricular romantic fantasies. In sharp contrast, there was little Anna Litvak, the Ukrainian dance-hall hostess, devoted, sensible, in whom "there had survived through so much that was degraded and harsh . . . a clear little power of perception . . . a realistic sense of the way things were that had never become embittered." . . .

"I saw," the narrator writes, "that the union of Imogen and Ralph was a striking dramatic symbol of the queer combination, under capitalism, of a disgraceful economic reality and a dissembling romantic screen. Ralph made the money in advertising"—hiring himself out to greedy industrialists—"and Imogen spent the money on domestic settings . . . that made it possible for her always to fancy . . . that they were living under quite different conditions. But the world of Anna was the real world, the base on which

COPY BOUND CLOSE IN CENTER

everything rested." . . . Though recognizing all this, our hero fails to marry Anna when she needs him most ("I wouldn't quite dare to bring her out to Hecate County") and sinks glumly back into his suburban shadow-world, doomed forever to a Limbo one hour from Grand Central.

For economic "symbols," Mr. Wilson's characters in this story exhibit unusual depth and development. Like the other stories, it is written with genuine style, and the author has thrown in a handsome tribute to Brooklyn and some of the most explicit love-making that has ever seen respectable print.

POOR COPY

BLEED THROUGH

**TIME**

**March 25, 1946**

BOOKS

Memoirs of Hecate County. Edmund Wilson. Doubleday ($2.50).

Critic Edmund Wilson's first book of fiction since *I Thought of Daisy* (1929) is the first event of the year which can be described as "literary." For it is more & more unusual for U. S. writers to try to produce literature which is serious without solemnity, entertaining without shallowness, intelligent without owlishness, socially observant without being dogmatically vindictive, morally acute without being mealymouthed.

Among the six stories in this book are a study of the dead hand of the past on a living person; a study of the Manichaean heresy (the notion that the Devil is as powerful as God and that they struggle for supremacy); the galloping putrefaction of American letters; the galloping putrefaction of moral and political values. Author Wilson has also chosen to write literally (and incidentally) about sexual intercourse. As a result, *Memoirs of Hecate* County* will probably be hailed as an event in gaminess.

*Housebroken Suburbanites.*

Wilson's chronicle of his mythical county is a series of portraits of the demi-suburbanites who live amphibiously between heavily housebroken country and a U. S. metropolis (New York City). Unlike pudgy Author Wilson, the nameless narrator is a tall, slim analyst of the influence of social and economic conditions on painting. His neighbors and their doings are also imaginary, despite unmistakable glints and graftings of a well-known U. S. critic, a well-

*Pronounced heck-it; the goddess of witchcraft.

COPY BOUND CLOSE IN CENTER

known radio commentator, an up & coming publishing house, a famed literary magazine and book club.

One neighbor, an ex-professor of chemistry, egged on by a boozily mischievous advertising man, acts out a cruel, funny little fable of Good & Evil when he banishes the ducks he loves and sublimates the duck-killing turtles he abominates into a best-selling soup. "Turtle soup," chortles the adman, captioning a pallid portrait of a lady in crinolines, "saved the sweethearts and mothers of a proud and gallant race." Another neighbor, variously known as Blackburn, Malatesta and Swarzkopf, turns out to be the Devil, and delivers some of Author Wilson's most envenomed and heartfelt opinions (notably on Stalinism) in a monologue written entirely in French.

*All-Fours Romp.*

The high points in the *Memoirs* are Mr. Wilson's soon-to-be-notorious love story, *The Princess with the Golden Hair,* and *The Milhollands and Their Damned Soul.* The *Milhollands* is an uproarious all-fours romp through the whole world of U. S. writing, publishing and book-promotion. There is the eager young Yaleman who, after feeling that his "generation" has been "betrayed," first by T. S. Eliot and Ezra Pound, then by the Marxists, winds up ballyhooing bellywash on national hookups. There is the Purity League's investigation of the *Booklover* when its personal columns sprout a rash of "advertisements by 'gentlemen of robust constitution' in search of 'non-prudish ladies responsive to the new dance rhythms.' "

There is the honest, talented writer who has never published a serious book, but priggishly signs his detective stories with a nom de plume. He winds up cadging drinks, clowning out parody first lines of poems, and warming up bedroom scenes in a hack-written best-seller about two U. S. families who take part in every war since the Revolution ("After all, I was the person who suggested the whole idea of having Nancy Gaylord be the mother of Walt Whit-

POOR COPY

BLEED THROUGH

man's illegitimate child—it's terrific. He meets her at the Mardi Gras and lays her on a cotton bale—she realizes for the first time that the Yankees are not all as bad as she'd thought.") The satire is not intended to cut deep, but it is an enlightening and timely tract on current U. S. literature's peculiar disorders and needs.

*Marriage of Heaven & Hell.*

*The Princess with the Golden Hair* is a quiet but ambitious attempt to anatomize, through the narrator's contrasted affairs with two women, the U. S. middle class and the U. S. proletariat. The bourgeois wife, Imogen, is a convincing redigestion, in contemporary terms, of the kind of paralytic romanticism which Flaubert raged at (and suffered from). The proletarian taxi-dancer, Anna, is more vivid and engaging, and the glimpses into her world—a world of incidents like the Polish boarder's "doing his business and wrapping it up in paper" for Anna to pick up—are the most detached that any writer, left or right, has yet furnished on behalf of the U. S. working class and of its well-wishers. Psychologically, the story is weak in its failure to convince the reader that a man of the narrator's intelligence could pursue Imogen for two years without suspecting her obvious neurosis. Censors and eager beavers will be satisfied by certain passages which cannot be quoted in a magazine; adult readers may not be. It is possible to respect Edmund Wilson's intention and attempt without feeling that he has succeeded in what he tried.

Critic Wilson's purpose is to develop a subtle and ambitious theme of Evil in our times. His observations are not always adequate to his ultra-sophisticated posture; hence the posture sometimes looks a little self-deceived. But such civilized writing and observation are rare in the U. S. nowadays, and on its merits *Memoirs of Hecate County* is pretty certainly the best contemporary chronicle, so far, of its place and period. Evil is as vivid through the book as a bushful of snakes.

## The Devil in the Suburbs

Memoirs of Hecate County. By Edmund Wilson. New York: Doubleday and Co. 1946. 338 pp. $2.50.

Reviewed by Harrison Smith

When the man who is the sharpest and most readable literary critic of our time produces a long work of fiction he is laying himself wide open to attack. He who has assaulted so many fly-blown reputations and flattened so many writers who were hailed as budding geniuses may expect to find himself in the direful position of the armed knight of old who was pushed off his horse and lay helpless on his back where the common soldier might have a go at him. In this book he is attacking the suburban middle class whom the depression left so benighted and lost during the early thirties. This is a subject on which Mr. Wilson has touched in his book, "The American Jitters, the Year of Slump," 1931, and to which he returned four years later during his short love affair with Communism, in his "Travels in Two Democracies." He has an agile mind which embraces economics and literature with equal fluency.

His protagonist is an unmarried middle-aged dilettante who is trying to prove something by attempting to place art and economics in the same bed. But the reader will be more interested in his shrewd observation of the distraught lives about him rather than in his own opinions; and distraught they certainly are, with a touch of the diabolic, that is somehow or other not quite convincing, that is Mr. Wilson's own contribution. The little devils of hell can be caught now and then looking out of the eyes or peering over the shoulders of his characters. Most imaginative and over-read men may have these moments after a few post-prandial drinks when an ordinary room or a plainly neurotic woman seem to reveal a glimpse of the dark pit.

POOR COPY

BLEED THROUGH

"Memoirs of Hecate County" is named after the triple-headed goddess of midnight and black magic, but you will have to plow through a great many pages before you feel that genuine *frisson* up and down your back which is produced by some of his scenes. The three short novels which form the greater part of the book are prefaced by three satirical sketches which are variously interesting, if not absorbing. The best of them is perhaps "Glimpses of Wilbur Flick," a study of a frustrated rich man who finds in sleight-of-hand and parlor magic an excuse for his otherwise useless life, interspersed with the kind of hairbrained discussions of economics and technocracy which swept over young radicals and older men who had any money at all in those bad old days before prosperity swept over us again via the Second World War. It might be said that the book would be less confusing to the ordinary reader if it had contained only the short novels which are to a considerable extent related and which are penetrated by Mr. Wilson's diabolic undertones. Without these sketches, "Memoirs of Hecate County" would be over a hundred thousand words long and that ought to be long enough for anyone, though Mr. Wilson describes his innumerable characters and the effect they have on him with determined brilliance and clairvoyance. In the last long novel, "Mr. and Mrs. Blackburn at Home," it is indeed rewarding to come across this horrendous conception while the hero is kissing a responsive lady, "She seemed to me to be as voracious and hot as I had ever known her before . . . her lips parted in such a way as to show great long bare-gummed teeth that stuck out and yet curved back like tusks and that seemed almost too large to be contained in her mouth. She looked like a dog panting when you take it out for a drive. . . . I pounded kisses against it, etc. etc."

But a greater reward for the curious can be found in the longest of these novels, "The Princess with the Golden Hair," in which there are embedded some of the most frankly erotic passages that can be found in the modern writing that need not be sold under the counter. These amorous episodes, vaguely reminiscent of Frank Harris's

autobiography, will doubtless be the subject of controversy for some time to come. They are the result of the hero's reminiscences of his adventures among women about 1920 when he had gone on a tour of the art galleries abroad to live in New York, to walk in the evenings along Fourteenth Street and observe "the big-hipped, cat-faced women whose photographs were shown as lures in front of the burlesque theatres." These bare-skinned descriptions of love affairs, with nothing omitted, are, one might say, not in the least pornographic, if one accepts that word in any adult and intelligent way, but they are not especially revealing of anything except the flesh of the human animal and, oddly enough, the hero in his middle age seems somewhat priggish in his recollections of them from his salad days. But a great deal of what is fine and accurate writing and observation in "Memoirs of Hecate County" may be swept away in the minds of future readers by the notoriety that these scenes will evoke. We have managed to keep at bay the literary censors and the keyhole peepers who insist that books should not be printed that their little Lucy should not read. It would be unfortunate and ironic if our foremost literary critic should rouse these dogs to bay at literature again.

As a social and literary critic, Mr. Wilson's opinions are founded on an almost puritanical morality, as you will see if you read "Axel's Castle." He is always clear and direct and absorbing even when he has taken the privilege of a free man to change his mind. But what has become, in this confusing and cynical work of fiction, of the mind that has conceived his earlier books? Has the devil at work in the suburbs darkened Mr. Wilson's memories of the Lost Generation so that many of his characters, who can sometimes be labeled with living names, seem distorted and intermingled like the figures in a nightmare?

POOR COPY

BLEED THROUGH

**KNICKERBOCKER WEEKLY**

**July 22, 1946**

## On Edmund Wilson and Sundry Reflections

Memoirs of Hecate County, by Edmund Wilson. Doubleday & Co., New York, 1946. 338 pp. $2.50.

Edmund Wilson's *Memoirs of Hecate County* is on the best seller list! This, indeed, desrves an exclamation point. For Edmund Wilson doesn't belong on the best seller list and he doesn't belong there precisely because of his excellence.

A statement like the one above may sound contradictory, but readers who are familiar with contemporary American literature will get my point. However, for those who like to read anything they can lay their hands on and for those who let themselves be guided in their choice by the amount of advertising a certain book gets, in other words for those who fall for the tricks of the publishers' promotion department, the statement needs further explanation.

Literature in America has suffered from what I would like to call the production bug. More than anywhere else in the world good writing is being dragged down into the stream of mediocre and downright bad writing labeled "Literature." The mistaken notion that art should stoop to meet the people's taste has found a conspirator in the publishing world. Cheap, unimaginative books with a large promotion budget behind them make the best seller list, whereas the original, fine prose on which the publisher refuses to gamble mostly ends up in the publisher's basement.

Even several decades ago Havelock Ellis wrote in his essay, *The Art of Writing*, that " . . . if we wish to compare the condition of things to-day with that in an age when people wrote at the bidding of some urgent stimulus from without or within, we have at the outset to delete certainly

over ninety-five per cent of our modern so-called writers before we institute any comparison. . . ."

In this country, instead of going up, literary standards now seem to be declining even faster than Havelock Ellis could ever have dreamed. Everybody writes. The stimulus of money and glamour seem to be stronger than the urge from within or the voices the true writer catches from without. And publishers who made huge profits because of wartime conditions accepted manuscripts without having to consider their budgets first, launching them under big, harsh-colored banners. There is no end to the superlatives they use in their advertising and on the dust jackets: *. . . great literature . . . the greatest story ever written . . . surpasses anything a writer ever put down on paper. . . .* This winter in Chicago I discovered a sign outside a bookshop which read: "Buy while they last . . . *Forever Amber!*" A pretty low level in the practice of bookselling. Incidentally, *Forever Amber* sounded the beginning of a flood of literary prostitution.

The publication of this kind of books definitely marks an era in which money guides the writing profession. The instigator of these sorry affairs has been the movie industry, which, years before the war, was already bending over backwards to lower the artistic standards in this country and is mainly responsible for the bad artistic reputation the United States have abroad—a reputation which is wholly undeserved. Anybody who has lived in this country sufficiently long to have an opinion (and I mean longer than six weeks, the time granted our Dutch press representatives) and who made it his business to check up on cultural achievements, will agree with me that the arts in America are vigorously growing and blooming. But now it seems that Hollywood has decided to do its best to corrupt literary standards. As Wolcott Gibbs put it in *The New Yorker*, reviewing a book by Louis Bromfield: " . . . he writes with arms outstretched towards Hollywood . . ." Indeed, it takes an author with integrity and literary convictions to keep

POOR COPY

BLEED THROUGH

on writing with his back turned to the movie city. Hollywood money is a strong magnet and a corruptive influence on the world of writers, agents and publishers.

It is no easy matter for the public to know what to read and what to pass by. Good judgment requires some knowledge of American literary tradition and the urge to get acquainted with contemporary writing. For my compatriots here and abroad it is even more confusing—American literature was badly neglected in Dutch schools and at the universities. The books sent abroad by official and semi-official institutions shortly after the war were typical of official propaganda; it was a poor selection without artistic value.

The urge to become familiar with the best in American literature can well be satisfied by reading the different magazines which are sold in large bookstores in midtown New York and other big cities and on the stands in Greenwich Village, sometimes called the Montparnasse of New York. These magazines are: The *Partisan Review, Virginia Quarterly, Suwanee Review, Harpers Magazine,* the *Atlantic Monthly* and others.

The best literary reviewing outside of these specialized periodicals is being done by Edmund Wilson in the *New Yorker,* a quite unique weekly of sophisticated humor, one of the world's best.

Edmund Wilson's book reviewing comes closest to the criticism we were accustomed to see in the literary columns of some of the very best Dutch magazines before the war. This writer possesses the intellectual background, analytical faculties, the mind to dissect and reassemble the truth, the appreciation of originality and the feeling for logic that make the superb critic. In *Axel's Castle,* which was published in 1945, an illumination of the works of Yeats, Joyce, Eliot, Stein, Proust and Valery, he proves that he is one of the world's most important literary critics.

His latest fictional work, *Memoirs of Hecate County,* shows the same qualities as we mentioned above. The

volume comprises six different stories and short novels, laid apparently in Westchester County, north of New York, which the author here calls Hecate County, after the Greek goddess of the moon, earth and underworld. It appears from these tales that Mr. Wilson himself lived in Westchester County and mingled with some of the people who live there either all year round or during the summer. Although Mr. Wilson mingles, he remains the dissecter and philosopher, even when he seems to be emotionally involved in the affairs of his neighbors. In fact, he "seems" to be involved but never really is; the critic never loses his identity. Consequently it has been argued that Mr. Wilson isn't a writer of fiction, for he never gets beyond the circle he has drawn around his own personality. In a way the publisher admits this side of Edmund Wilson's character, the inability to step across the border between himself and others: they printed on the dust jacket, ". . . the adventures of an egotist among the bedeviled."

Of the six stories in this book I liked the first best: "The Man Who Shot Snapping Turtles," a completely original tale about a man who makes the best of an annoyance, or rather makes profit out of a neurosis. It is a tight and brilliantly written narrative. Next to this I enjoyed best "The Princess With the Golden Hair," the story of a man's love for two entirely different women so convincingly true that from now on my mind will not be able to separate Mr. Wilson from this, his experience. It shows the author's courage and honesty, sophistication and, in a way, a certain emotional immaturity, so common with men in this hemisphere. Severe critics, of which Mr. Wilson as a provocative personality, has many, have argued that the story in itself is immature and pornographic. I don't think so. It is rather the true picture of the American man in the stratum of society where people like Mr. Wilson linger. A world full of intellectual, egotistical and immature men, intelligent, emotionally starving society women, and lower class girls with a lot of dignity and sense, but forever victimized.

POOR COPY

BLEED THROUGH

Getting back to the best seller list, Mr. Wilson's uncompromising critics have snickered that his book is on this list of the most widely read books because of its pornographic paragraphs. By saying this they have substituted the word pornography for honesty and artistry and proved to have a very poor literary appreciation. The revealing passages are part of his minute cataloging of what might in other authors be emotional response but in him is realistic observation.

There may be people who buy *Memoirs of Hecate County* for the "Purple" in it, but in looking for those paragraphs they will have to read the book and there is a good chance that they will acquire a taste for good literature. As long as they are not leafing through *Forever Amber* with the same purpose in mind, it is all right with me.

DOLA DE JONG

(*As we go to press we hear that Mr. Wilson's book has been seized by the New York police at the request of the New York Society for the Suppression of Vice. New York seems to be jealous of Boston's dubious Puritan reputation. We are quite certain that the Society will not suppress vice by these methods, and we hope that the courts will show that it cannot suppress good literature either.* —The Editor.)

THE NEW REPUBLIC
March 25, 1946

BOOKS IN REVIEW

## *Limbo-by-the-Sea*

Edmund Wilson's new book, *Memoirs of Hecate County*,[1] is a cycle of six long stories; in other words, it is an example of a rather new literary form developed in this country as the result of a conflict between writers and their public. The American public reads stories in magazines, but in the past it has most often refused to buy them when they were collected between cloth covers; decidedly it prefers novels. American writers, on the other hand, have shown no such natural bent for writing novels as exists in England or Russia and, to a lesser extent, in Germany and France. Their best work has often been done in another medium, the novelette or short novel or long story, for which there was neither a book nor a magazine market (nor even a single name, until Whit Burnett adapted a European word and called it the "novella"). The result was a compromise: many of the writers began grouping their long stories into cycles that dealt with one background or a single group of characters; thus, they continued working in their own medium while giving the same unified effect as in a novel.

*Memoirs of Hecate County* is a successful example of this new form, a better and firmer piece of work than *I Thought of Daisy*, the novel that Wilson published in 1929. Partly that is because his style (no longer Proustian), his sense of construction and his judgment of persons have all developed in the intervening years; but also, like most American writers of our time, he seems more at home in stories. He likes to take up a character, develop him to a

[1]Memoirs of Hecate County, by Edmund Wilson, New York: Doubleday and Company. 338 pages. $2.50.

POOR COPY
BLEED THROUGH

certain point, then let him drop out of the book as friends drop out of our lives; perhaps returning to him later in another story, as if a college chum had stopped us on the street. He can build a long story firmly and continue it to the end, whereas his one novel always seemed to be starting and stopping as if it too were really a collection of tales. At the same time, all six stories in the volume fit into one physical and social and moral frame.

Hecate County is situated on the seacoast within two or three hours of New York; in its physical aspects it seems to be a combination of Monmouth County, New Jersey, and Fairfield County, Connecticut, with several features borrowed from Cape Cod. Socially it is inhabited during the summer months by prosperous middle-class people, all of them bright, talkative, well read, alcoholic, and many of them engaged in publishing or the arts. Morally it is the scene of a conflict between good and evil, in which evil is stronger and more personalized—one of the characters is or appears to be Satan himself—and wins minor victories one after another, but never achieves a complete triumph. The first story, "The Man Who Shot Snapping Turtles," fixes the moral atmosphere. Asa M. Stryker, a rich man of the neighborhood, loves the wild ducks that breed near his pond and hates the snapping turtles that eat the ducklings. He says, "If God has created the mallard, a thing of beauty and grace, how can He allow these dirty filthy mud-turtles to prey upon His handiwork and destroy it? . . . If the Evil triumphs there, it may triumph everywhere." Finally Mr. Stryker becomes so obsessed with the malignity of the turtles that he changes his aims, drives away the ducks, starts a turtle farm and becomes richer still through selling turtle soup. He takes the side of Evil, and it destroys him.

"Ellen Terhune" is almost a very fine story, almost, I should say, on a level with the good later work of Henry James—with "The Jolly Corner," for example, which it resembles in mood. It deals with a middle-aged woman

composer who is going insane and lets her obsessions appear in a sonata that she is unable to finish. She involves the narrator in her problems and hallucinations. Every time he visits her house, he sees or thinks he sees a scene that is farther in the past: first he meets Ellen as a young woman just home from the Paris Conservatory, then as a lonely girl in her teens; then he sees her mother just before Ellen's birth, then her mother before marriage to Ellen's father. In this last scene, however, there is a modern intrusion: Ellen herself, in the next room, plays the sonata with which she has been struggling so long, and it proves to be an impressive piece of work. The narrator bursts into the room where she has been playing; and exactly at this point the story, which has been acquiring a baneful intensity, begins to lose conviction. The author flinches from the big scene toward which he has been building, the scene that will serve as an explanation and a catastrophic climax. There is no scene with Ellen at all; the music room is empty; and we learn in an epilogue that she has died of heart failure that afternoon in a cheap New York hotel.

"Glimpses of Wilbur Flick" is the portrait of a detestable rich man who becomes an angel or fat cat for the Communists; it seems to me the weakest story in the book. "The Princess with the Golden Hair" is the longest and comes near being the best as well. It describes the narrator's simultaneous love affairs with three women (are they the three aspects of Hecate, the goddess of magic arts?), and it begins with a marvelous picture of a golden-haired creature who lives as if in a fairy tale. But halfway through the story, one's interest begins to flag. The descriptions of love are so zoological, the narrator is so intent on making a safari through the bedroom with gun and microscope, that we find he is preserving only the stuffed and mounted hides of his love affairs; what has disappeared is simply their passion, the breath of their life. And the reader feels like those children in a very progressive school who went to their teacher with a question. "We know all

POOR COPY

BLEED THROUGH

about how babies come to be born," they said, "but what we can't understand is why people like to do it."

"The Milhollands and Their Damned Soul" is satire mixed with extravagant burlesque and mixed again with some accurate notes on the publishing world. Within the limitations of its method—which is to combine known characters and institutions, choosing the worst features of each—I should call it completely successful, good dirty fun.

"Mr. and Mrs. Blackburn at Home," the last of the six stories, deals with a character who is, or whom the narrator in his alcoholic confusion fancies to be, the Devil himself. Mr. Blackburn, as he is known in Hecate County, gives a long speech in old-fashioned French about his tribulations in the contemporary world, where the human malice that was his special domain has given way to an immense and impersonal cruelty; he is planning to start a religious revival in the hope of collecting just a few damned souls. After this speech, the story dissolves into a series of very effective alcoholic nightmares; the narrator wakes from them at last and decides to build a new life with one of his mistresses in the Arizona desert; but vainly, for he will carry Hecate County with him wherever he goes.

In the end, one feels that the six stories are more impressive in one volume than any of them would be standing alone. Besides having the unities of time and place and the personality of the narrator, they are also held together by a single mood of revulsion. It is a feeling on the part of the author and his characters that this sort of life for individuals can't go on indefinitely; that, if they are to continue living, they must find some ritual of purification, of death and rebirth into a new faith, that will give them a purpose in life beyond making money and finding new sleeping partners. They try all the fashionable drugs: alcohol and sex and sleeping tablets and psycho-analysis, not to mention Communism and Catholicism, but nothing seems to change in their world; there is always lightning on the horizon and thunder rumbling overhead; but, as in *The Waste Land*,

the storm never breaks and they are all left wandering in Limbo-by-the-Sea. This failure of all the characters to find a direction for their lives seems connected with the failure of the separate stories and of the book itself to find any sort of climax, except in drunken nightmares. The weakness in technique that one felt at the end of "Ellen Terhune" is also a weakness in the book as a whole; and it is essentially a lack, not of skill or technique, but rather of animal faith.

MALCOLM COWLEY.

BLEED THROUGH

POOR COPY

## TOMORROW

**June, 1946**

### MEMOIRS OF HECATE COUNTY

By EDMUND WILSON.
Reviewed by JOHN RICHMOND.

Hecate is the Greek goddess of midnight and magic. Hecate County is the mythical name of a suburban paradise populated by hardbitten folk, restless and confused, suave and urbane. Once many of them guzzled bootleg liquor and were scared by the depression; today they scorn the UNO and are frightened by the atom bomb. They are described with brilliance, erudition, and keen insight by Edmund Wilson in his six satiric interrelated stories called *Memoirs of Hecate County*.

One of America's most distinguished literary critics and currently the book reviewer of *The New Yorker*, Mr. Wilson chronicles the memoirs of a nameless man who appears in each story and is sometimes the narrator, sometimes the leading character, and always obviously erudite, egotistic and subtly formidable, a lonely man.

The most original and macabre story is "The Man Who Shot Snapping Turtles." Its hero's chief conversational topic is the princely and majestic wild ducks which float gracefully on his small pond. Unable to prevent them from being devoured by snapping turtles, he broods over his helplessness until the obsession turns into a kind of religious mania, in which the ducks become forces for good continually destroyed by the forces of evil, the snapping turtles. He determines to outmaneuver the forces of evil by exploiting them. He breeds turtles commercially, and aided by a neighbor devises a "Snapper Consomme" with a wide appeal which piles up huge profits. His eventual defeat and destruction are a bit of intense irony.

"Glimpses of Wilbur Flick" is a study of a rich and rootless frustrated man floundering in search of a satisfying pursuit to compensate for his useless existence. He tries

alcohol, narcotics, psycho-analysis, the Catholic church, and an American Fascist movement, finally winding up a convert to Communism in the company of ineffectual left-wing intellectuals, where he finds a dubious happiness and solace. Such social maladjustments were quite common in the tumultuous thirties, and Wilbur Flick has been portrayed sharply, wryly, honestly.

The most penetrating and powerful story, however, is "The Princess with the Golden Hair," which relates with considerable detail a man's affair with two women: Imogen, the golden-haired princess, the beautiful and neurotic wife of a successful advertising executive; and Anna, a loyal, simple Brooklyn dance-hall hostess. Although the prurient may perhaps regard the passionate but realistic scenes of lovemaking as pornography, sensitive, intelligent adults will recognize this story for more than a hauntingly beautiful description of all the nuances and depths of a man's true love for a woman. Its ending is a merciless reflection of our present civilization. The man realizes it is Anna who has given him ". . . something so strong and instinctive that it could outlive all the hurts and infections, the defilements, among which we lived . . . a belief and a beauty that could not be justified or explained . . ." But he fails to marry her even when she needs him most desperately, because he does not have the courage to bring her to Hecate County.

"The Milhollands and Their Damned Soul" is a satirical castigation of commercialized literature, personified by three brothers. One heads the selection committee of a big book club; the second reviews for the radio popular novels he calls classics; and the third edits a literary weekly famous for its frisky personal columns. The low estate of American letters is adroitly revealed—and convincingly explained.

These are the outstanding chronicles in a collection of serious stories, which are entertaining, intelligent, socially observant, and civilized. Mr. Wilson has written what appears to be the definitive book about a group of people who have failed both the world and themselves spectacularly.

Doubleday, $2.50.

POOR COPY

BLEED THROUGH

**PARTISAN REVIEW**

**Summer, 1946**

## Le Misanthrope

Memoirs of Hecate County. By Edmund Wilson. Doubleday. $2.50.

In its mordant analysis of our middle-class culture, in its pessimism and in the symbolic attempt of its hero to find his true class, this book resembles *The Education of Henry Adams*. But its real counterpart in American writing is a dark and distorted parable by Melville called *The Confidence Man*. I have never thought the latter a good novel, though I respect the force with which Melville described the moral bareness and deceptions of his time; and though Mr. Wilson's book is better, it is not very good either. Unfortunately, perishable books get praised, poor books are genially tolerated; we are always kind to books that do not simply annoy us. *Memoirs of Hecate County* has enough in it to make the fortunes of a dozen writers; but it is not a good book. The judgment is proportionate to Edmund Wilson's gifts, which are extraordinary and sometimes unpleasant, and to his peers, who are very few in this country.

Mr. Wilson's books have always come to us dangling an historical key with which to open them; with it we can open them—just that. His mind takes wings from references, historical associations, the personal details behind a career. The elaborate symbolism of this book, for which we are prepared by the myth of Hecate, the epigraph from a horror story by Gogol that prefaces it, and the excessive tension with which the settings are given, is another example of Mr. Wilson's mind working in the historical underbrush. The architectural and domestic references in it—houses, gardens, manners, costume, furniture—even weigh his pages down. Yet it is a sign of the deeper claims of his imagination that these "keys"—the Finland Station, Axel's Castle, Hecate, the artists who are triple thinkers, the

wound of the artist and the bow of his art—are only overtures to the conflict between the superior individual and society that is his main subject. Very few people in the large audience that has profited from *Axel's Castle* reached the castle itself, the workshop of symbolism; no one can forget Proust locked up in the "Heartbreak House of capitalist culture." The Finland Station in Petrograd, 1917, was a symbol of the struggle of man to reach an appointed destiny in his modern determination to change the world. But if Lenin arrives at the station on time, it is without the emotion of the Revolution. Half-way through the book Mr. Wilson went sour on Marxism, and it is the romance of Marx that we remember, not his theory or the way millions of lives have been changed by it.

Mr. Wilson's subject is history, and in history the personal careers shape its meaning for him. His masterly study of Dickens in *The Wound and the Bow*, a far better short story than any in this book, was yet only a way of showing Dicken's fate in the social structure of England. In this book, too, his interest is in careers, not in lives. A career is a complete cycle, seen from the outside, which can present to a mind like Mr. Wilson's the dramatic episodes of a life. But a life is built up inductively, from the universal nouns of human experience; it is slow work, it is threadbare, it is fiction. Mr. Wilson is not really interested in fiction; only in using it to put a floor of imaginary detail under his historical commentary. The fact that he can employ the apparatus of fiction with technical brilliance does not contradict this point; it only makes it a sadder one. For Mr. Wilson is too imaginative a writer and too complex a personality, driven by too insistent a personal ache, as artists must be, to analyze events in their "objective" appearance merely. He is too involved in the cross-stimulation of man and his outward culture to escape the library; or rather, the cultural dream which so often is life for him. He has been an example of a kind of transverse talent which is common in France, where ideas become conscious forces. I

POOR COPY

BLEED THROUGH

have the greatest admiration for this talent, which is so much like Henry Adams's, and like Adams's, driven by a longing for excellence, true aristocracy, and a social home. But it is a talent whose roots have got a little twisted in Hecate County. For Mr. Wilson's view of history is now merely mordant. Lives are still closed to him; that is, he is still more interested in careers than in character. The historian prods the novelist; the novelist wants to break through the mask of history, but has long ago forgotten its exchange-value back into particular human terms. All experience is devaluated into symbols. Meanwhile, the man wants to tell us something direct about himself, and has made sure that he will not. The result is to reduce the book to a curiously covert kind of commentary.

Hecate is very congenial to Mr. Wilson's mind at present. "Where three roads meet, there is she standing." Tri-formed, bearing torches, a snake, a club, a key, etc., she represents the cross-roads and the phases of the moon. Light and darkness alternate through her. So that we see her and yet do not see her, as a man will struggle to see a figure in his dreams. "Hecate County" is clearly meant to be the landscape of a type of middle-class mind in this country. We see it in the acute period of the American crisis, between Hoover and Hitler. Around this region Mr. Wilson has traced the marks of the deepening world crisis and the challenge to the democratic and moralistic faith of the West by the totalitarian states. The narrator is the real hero; all its threads are in his hands. He has no name. He is a young art-critic, trained as an economist; his main interest is the history of painting "from a social point of view." His family is a cultivated one; his father is a financial expert for one of the big companies in Detroit. The father is a scholarly technician, in fact, who is of service to the management side of industry, but not of it. He is indifferent to its social drives. This background has a suggestive resemblance to Mr. Wilson's own, for he comes from a professional yet unmetropolitan background which

gave him the sense of belonging to the pre-corporate side of American life and at the older, less frantically acquisitive, end of the American middle-class. Like Mr. Wilson, the narrator detests the new bourgeois culture of twentieth-century metropolitanism and feels he has transcended its values through an intellectual occupation. At the same time he cannot free himself of Hecate County, of the immediate frivolities of his immediate social group. Nor can he descend—despite his radical sympathies—to the working class.

The main subject of the book is the narrator's attempts to learn his true social allegiance despite "the prison of the social compartments." Its main action consists in his attempts to locate this allegiance in his relations with three women. There is Jo, his friendly and frivolous mistress half the year, whom he resigns himself to at the end as the symbol of his social imprisonment. Jo is the narrator's immediate social life, as he lives it between sensual pleasure and self-contempt among the coktail set in Hecate County. When Jo is away, he finds himself simultaneously involved with Anna, a Brooklyn waitress and the daughter of disreputable immigrants, and Imogen, the romantically beautiful wife of an advertising-agency executive and a neighbor in Hecate County. Anna is the working-class, the immigrant underside of American life, the poor; the narrator is drawn to her strength, devotion and direct knowledge of life, but recoils at frequent intervals because of Imogen. She is the story-book past, the idealized memory, which represents the narrator's nostalgia, his vision of childhood in critical maturity. Hers is the world before Hecate County, and really before sex. Imogen is beautiful because she is essentially unpossessable, as the past is unrecoverable. She is also, as he learns long afterwards, neurotic rather than crippled, as she thinks she is. But her neurosis serves to keep her from any real personal risks and critical encounters, and represents the flaw in the past, its secret deceptions.

POOR COPY

BLEED THROUGH

In this three-fold world the symbolic reference is very wide. The three women represent not only phases of the different societies to which the narrator is attracted in turn. They represent also periods in time to which the hero returns in dreams; not always sleeping dreams. These are interpolated with great technical skill by Mr. Wilson and furnish increased knowledge of the past—I should say *documentation*—and taken together symbolize the alternate and negotiable levels of consciousness on which we live. The principal conflict takes place in "The Princess With The Golden Hair," which is the only one of the six stories that is occasionally moving. But it is caught up so repetitiously on the narrator's rigid design of all its meanings that it loses the advantages it has gained by awakening the mind with symbols. Nothing emphasizes this so well as the now-famous fullness of Mr. Wilson's descriptions of fornication. These are really pathetic, and the shop girl I once saw blinking in the IRT at the rush-hour, leafing through Mr. Wilson's book in the hope, was really in for a disappointment. Lawrence at least idealized what is so misleadingly, in modern times, called the act of love. Mr. Wilson's narrator is so locked up in his own mind that he seems to have his encounters only for what he shall think of them. Nothing could be further removed from passion; or even from neurotic conquest; or even from mechanical lechery. These scenes are thought masquerading as acts, and are not even the similes of acts; and they are not thoughts but the waverings of a mind weighing its social loneliness and confusion. The sex act here is the cosmetic of a philosophy; and I do not know what I dislike more in these scenes—the fact that the narrator is such a worm or the clutter with which Mr. Wilson conceals his distance from human intimacy. Yet Anna, whom Mr. Wilson has tried so hard to document in all her esoteric lowliness that she lives near something called *The* King's Highway in Brooklyn, and amid an assortment of no-goods drawn from every imaginable Sudetenland in Brooklyn—Anna does come through, for the narrator

COPY BOUND CLOSE IN CENTER

wants so hard to reach her world that he brings her alive under the pressure of his real emotion.

In three stories, "The Man Who Shot Snapping Turtles," "Glimpses of Wilbur Flick," and "The Milhollands and Their Damned Soul," Mr. Wilson describes vicious, idle, and deliriously acquisitive sides of American life—the eccentric cruelties, the lack of standards, the scintillating phoniness. There are fine satiric strokes in them all, especially in the last, concerned with literary politicians. More important, after "The Princess With The Golden Hair," are "Ellen Terhune" and "Mr. and Mrs. Blackburn at Home." In both dream sequences are used; in the first to recreate the troubled life-cycle of a brilliant woman composer, which the narrator, very close to her in his alienation from their social class, does through uneery sequences of her early and middle life. It is characteristic of Mr. Wilson's talent, which has great underhand force, that the machinery for this recreation and the late nineteenth-century interiors among which Ellen Terhune's tragedy is imagined, should be so much more lucid than the figure of Ellen herself. It is not Ellen whom we get to know in easy human detail; it is the sense of time, and its cruel undertow forever dragging us back into the past we blame; of the pathos of the family and its genteel heartlessness. Ellen's suffering is vivid, but she has been created not for what she is, but for what she concentrates, to Mr. Wilson's imagination, in the facts of her class and her type of career.

In "Mr. and Mrs. Blackburn at Home" Mr. Wilson pulls off his last feat and really gives us some of his inner thoughts. "Ellen Terhune" is the story of the late twenties and of the new intelligentsia that sought fresh thought in Europe. The Blackburn story begins on Europe in America, the refugees, the American dragging into war, and already reading something of the struggle in the refugees. The narrator goes to a party at the house of a vaguely European man of all affairs called Blackburn. The episode

POOR COPY

BLEED THROUGH

falls into a dream, interpolated in such a way as to blend the distinctness of sleep and the stupor of awakening, the symbolic depth of dreams and the hesitant shallowness of consciousness. Blackburn begins a conversation with the narrator on art, and suddenly going off into French, reveals himself disconsolately as the Devil. He has turned to French because events have become so irrational that only the neatness and precision of French can put them in order. He indignantly describes the Soviet purges, the forthcoming horrors of the Nazi terror, and ascribes them to the decay of organized religion—that is, of the Catholic Church. Ever since the Reformation, he complains, the diminishing belief in sin, in the reality of any struggle between good and evil, has robbed him of his occupation. The new nihilism has dispensed with God—"my distinguished opponent"—and therefore with him. He now sees his last opportunity in America, where there remains some deposit of religion, of belief in sin, and therefore in him.

A hit, a hit: but where are we with it? Dostoevsky needed to believe in the Devil, and finally convinced himself that he did. Mr. Wilson's Devil is briiliant, and the whole episode is an instructive tour-de-force; but his handling of it is frivolous. A generation ago writers divulged intimate details of the body only to those who knew a little Latin—your cultivation was the admission of your respectability. Mr. Wilson has similarly confined his full loathing of Stalin's Russia to those who are also a little *deracine,* like the Devil—the intellectuals without dogma, the homeless radicals; those who have paid, like Mr. Wilson, for their freedom of thought. But even from the point of view of the sympathetic reader, it is clear that the Devil serves only to dispose of Mr. Wilson's rather complicated irony and exasperation, since he cannot resolve them himself. The darkness of the moon over America in this story is very thick. What Mr. Wilson really feels like saying is, "The Devil take it!" And it is significant that the Devil is a European. Not the least of his uses here is to point up Mr.

COPY BOUND CLOSE IN CENTER

Wilson's disgust with Europe and to make a claim on America deeper than he makes out. It is not that he is Bernard DeVoto; his disappointment in America is profound, and its legendary "promise" in the West is bitingly satirized. But he is writing under the sign of darkness, and his narrator represents a social weariness, a poisonous neutrality between Anna's working-class life and Imogen's story-book past, that emphasizes the vacancy of his present. And emphasizes it in a world in which the old clerical serpents of absolute good and evil have suddenly come back; in the "Heartbreak House of Capitalist Culture," which is supposedly eternal. There is almost too much for Mr. Wilson to say at the end, for he says it all as an historical interpreter—that is, as a kind of journalist. And his misanthropy is so great that, in a curious last line, he tries to redeem it a little by saying, in effect, "Life and Time go on." But this excess of material, this disproportion of personal chagrin, are still only the marks of a novelist who has not *imagined* his material, but has used fiction to put his hostility on a different plane. Fiction, when it is done by the total imagination of the novelist, is never so unrelieved in its personal bitterness or so cluttered in its effects. It resides within its own economy. But as Mr. Wilson lacks the novelist's suspension of disbelief, the novelist's respect for experience, so he lacks the novelist's involuntary generosity. Like Melville in *The Confidence Man*, he can end his book only by sharply putting out the light. His book will live not because it is a work of imagination, but because it is a source-book in the sadness of Americans.

ALFRED KAZIN

POOR COPY

BLEED THROUGH

## JEFFERSON'S LETTER TO N. DUFIEF

(Referred to in Footnote No. 6, Brief p. 29)

The following letter was written by Thomas Jefferson to his book seller in Philadelphia, N. Dufief, replying to Dufief's letter of April 6, 1814, in which he told Jefferson that he was being prosecuted for the sale of a book, De Becourt, *Sur la Création du Monde, un Systême d'Organisation Primitive,* which apparently had atheistic overtones. He asked Jefferson to help him because he had procured a copy of this book for Jefferson himself. The text of this letter is reproduced from Padover, *The Complete Jefferson* (1943), 889.

"April 19, 1814.

I am really mortified to be told that, *in the United States of America,* a fact like this can become a subject of inquiry, and of criminal inquiry too, as an offence against religion; that a question about the sale of a book can be carried before the civil magistrate. Is this then our freedom of religion? and are we to have a censor whose imprimatur shall say what books may be sold, and what we may buy? And who is thus to dogmatize religious opinions for our citizens? Whose foot is to be the measure to which ours are all to be cut or stretched? Is a priest to be our inquisitor, or shall a layman, simple as ourselves, set up his reason as the rule for what we are to read, and what we must believe? It is an insult to our citizens to question whether they are rational beings or not, and blasphemy against religion to suppose it cannot stand the test of truth and reason. If M. de Becourt's book be false in its facts, disprove them; if false in its reasoning, refute it. But, for God's sake, let us freely hear both sides, if we choose. I know little of its contents, having barely glanced

COPY BOUND CLOSE IN CENTER

over here and there a passage, and over the table of contents. From this, the Newtonian philosophy seemed the chief object of attack, the issue of which might be trusted to the strength of the two combatants; Newton certainly not needing the auxiliary arm of the government, and still less the holy author of our religion, as to what in it concerns him. I thought the work would be very innocent, and one which might be confided to the reason of any man; not likely to be much read if let alone, but, if persecuted, it will be generally read. Every man in the United States will think it a duty to buy a copy, in vindication of his right to buy, and to read what he pleases."

POOR COPY

BLEED THROUGH

## EXCERPTS FROM JEFFERSON'S WORKS, REMARKS ON FREEDOM OF THE PRESS

(Referred to in Footnote No. 7, Brief p. 29)

In his *Proposed Constitution for Virginia* in June, 1776, Jefferson wrote: (Padover, *op. cit.* 103, 109)

> "Printing presses shall be free, except so far as by commission of private injury cause may be given of private action."

In his *Draft of a Constitution for Virginia* (June, 1783) he wrote: (Padover, *op. cit.* 110, 119)

> "Printing presses shall be subject to no other restraint than liableness for false facts printed and published."

Compare also *A Charter of Rights Established by the* [French] *King and Nation,* (1789) in which Jefferson wrote: (Padover, *op. cit.* 125)

> "Printers shall be liable to legal prosecution for printing and publishing false facts, injurious to the party prosecuting; but they shall be under no other restraint."

Jefferson also would have preferred that the First Amendment should spell out its protection of the press in the language he himself had long used. See his letter to James Madison, Paris, August 28, 1789, as reprinted in 7 *Lipscomb,* ed., *The Writings of Thomas Jefferson,* (1903-1904) at p. 456:

> "I must now say a word on the declaration of rights, you have been so good to send me. I like it, as far as it goes; but I should have been for going further. For instance, the following alterations and addi-

COPY BOUND CLOSE IN CENTER

tions would have pleased me: Article 4 'The People shall not be deprived of their right to speak, to write or *otherwise* to publish anything but false facts affecting injuriously the life, the liberty, property or reputation of others, or affecting the peace of the confederacy with foreign nations'."

BLEED THROUGH

POOR COPY

## EXCERPT FROM TUCKER'S APPENDIX TO BLACKSTONE

(Referred to in Footnote No. 8, Brief p. 30)

The following quotation is taken from Judge Tucker's Appendix to *Blackstone* as it was published in 1803, 2 *Tucker's Blackstone*, Appendix, Note G, "Of the Right of Conscience; and Of the Freedom of Speech and of the Press" (pp. 11-12):

> "Liberty of speech and of discussion in all speculative matters, consists in the absolute and uncontrollable right of speaking, writing, and publishing, our opinions concerning any subject, whether religious, philosophical, or political; and of inquiring into and, examining the nature of truth, whether moral or metaphysical; the expediency or inexpediency of all public measures, with their tendency and probably effect; the conduct of public men, and generally every other subject, without restraint, except as to the injury of any other individual, in his person, property, or good name. Thought and speech are equally the immediate gifts of the Creator, the one being intended as the vehicle of the other: they ought, therefore, to have been wholly exempt from the coersion of human laws in all speculative and doctrinal points whatsoever: liberty of speech in political matters has been equally proscribed in almost all the governments of the world, as liberty of conscience in those of religion. A complete tyranny over the human mind could never have been exercised whilst the organ by which our sentiments are conveyed to others was free: when the introduction of letters among men afforded a new mode of disclosing, and that of the press, a more expeditious method of diffusing their sentiments, writing and printing also became subjects of legal coersion;

COPY BOUND CLOSE IN CENTER

even the expression of sentiments by pictures and hieroglyphics attracted the attention of the Argus-goverment, so far as to render such expressions punishable by law. The common place arguments in support of these restraints are that they tend to preserve peace and good order in government; that there are some doctrines both in religion and politics, so sacred, and others of so bad a tendency that no public discussion of them ought to be suffered. To these the elegant writer before referred to gives this answer: 'were this a right opinion, all the persecution that has ever been practised would be justified. For if it is a part of the duty of civil magistrates to prevent the discussion of such doctrines, they must, in doing this, act on their own judgments of the nature and tendency of doctrines; and consequently, they must have a right to prevent the discussion of all doctrines which they think to be too sacred for discussion, or too dangerous in their tendency; and this right they must exercise in the only way in which civil power is capable of exercising it, by inflicting penalties on all who oppose sacred doctrines, or who maintain pernicious opinions.'"

(The writing referred to is Price's *Observations on the American Revolution*, page 19.)

POOR COPY

BLEED THROUGH

## EXCERPT FROM INGERSOLL'S ADDRESS

(Referred to in Footnote No. 9, Brief p. 30)

From *A Discourse concerning the Influence of America on the Mind; being the annual oration delivered before the American Philosophical Society, at the University in Philadelphia, on the 18th October 1823,* Philadelphia, A. Small, 1823, as reprinted in Blau, *American Philosophic Addresses,* 1946, pp. 29-30:

> "Not less than a thousand newspapers, some of them with several thousand subscribers, are circulated in this country; the daily fare of nearly every meal in almost every family; so cheap and common, that, like air and water, its uses are undervalued. But a free press is the great distinction of this age and country, and as indispensable as those elements to the welfare of all free countries. Abundant and emulous accounts of remarkable occurrences concentrate and diffuse information, stimulate inquiry, dispel prejudices, and multiply enjoyments. Copious advertisements quicken commerce; rapid and prevading publicity is a cheap police. Above all the press is the palladium of liberty. An American would forego the charms of France or Italy for the luxury of a large newspaper; which makes every post an epoch, and provides the barrenest corners of existence with an universal succedaneum. Duly to appreciate the pleasures of it, like health or liberty, we must undergo their temporary privation. Nor is our experience of the licentiousness of the press too dear a price to pay for its freedom. It is a memorable fact in the history of American newspapers, that while some of the most powerful have been consumed in the combustion of their own calumnies, on the other hand, the most permanent and flourishing are those least addicted to defama-

COPY BOUND CLOSE IN CENTER

tion. It is also a fact, that the most licentious newspapers which have appeared in America, were edited by Europeans. The American standard is equally removed from the coarse licentiousness which characterises much of the English press, and the constraints of that of the rest of Europe—and this standard has been established, while state prosecutions have been falling into dislike. Our newspapers are regulated by a public tact much truer and stronger than such ordeals. The same ethereal influence in a free temperature, is equally effective to preserve the good from obloquy, and to consign the unworthy to degradation. Where the press is perfectly free, truth is an overmatch for detraction. Many of our public men have constantly enjoyed the public favour, in spite of intense abuse; and have survived its oblivion, to receive a foretaste of posthumous veneration. Under the light of these results, the press has learned the value of temperance, and while all the avenues of private redress are open to those who choose to seek it, state prosecutions have nearly disappeared. Irreligious, obscene, and seditious publications, are infinitely more common from the English than from the American press: scurrilous and libellous newspapers exist to be sure, but they are the lowest and most obscure of the vocation; whereas in England, some of the most elevated and best patronised, are the most scandalous and personal. In the darker ages, dungeons, scaffolds, torture, and mutilation, were the dreadful, but vain restraints put on the understanding. Can it be supposed, that in this enlightened æra, punishment, however mitigated, will do more than inflame it? And what is the English law of public prosecution for libels, but a milder remnant of those principles? By which, infidelity, blasphemy, sedition, treason, and individual calumny, are provoked, disseminated

POOR COPY

BLEED THROUGH

and infuriated. Experience has taught us, that the freedom of the press is the best protection against its abuse, and that its transient licentiousness is part of the very nature of the blessing itself. The splendid skies, forests and foliage of America, with which Europe has nothing of the kind to compare, are inseparable from those vicissitudes and extremities of weather and seasons, which, while menacing desolation, purify and sublimate existence. This American deduction of the much apprehended postulate of the press, is obviously and rapidly gaining converts in England, whence perhaps it may ultimately spread over Europe, and abolish the pernicious alternatives there prevalent. Without it, the press must cause convulsions, and retard the progress of the mind. The English newspaper press, much less free by law than the American, is in practice much more licentious. A late number of the Quarterly Review, (which is no mean authority on such a point) admits, in so many words, that the occupation of the English daily press is, to 'do every thing that honor and honesty shrink from': to which character the absence of decency should be superadded. The Attorney General protects government from libels; but the Chancellor has brought about a most preposterous state of things between the right of literary property, and the want of right in obscene, blasphemous, or otherwise illegal subjects of that property."

COPY BOUND CLOSE IN CENTER

## EXCERPT FROM DEWEY, *ART AS EXPERIENCE*

(Referred to in Footnote No. 20, Brief p. 35)

The following quotation is taken from John Dewey, *Art as Experience* (1934). It is from the last chapter in which Dewey is discussing the general relationship of art and civilization. Having declared that "as long as art is the beauty parlor of civilization, neither art nor civilization is secure", Dewey goes on to discuss the moral office of art and at pages 347-349 says:

> "It is by way of communication that art becomes the incomparable organ of instruction, but the way is so remote from that usually associated with the idea of education, it is a way that lifts art so far above what we are accustomed to think of as instruction, that we are repelled by any suggestion of teaching and learning in connection with art. But our revolt is in fact a reflection upon education that proceeds by methods so literal as to exclude the imagination and one not touching the desires and emotions of men. Shelley said, 'The imagination is the great instrument of moral good, and poetry administers to the effect by acting upon the causes.' Hence it is, he goes on to say, 'a poet would do ill to embody his own conceptions of right and wrong, which are usually those of his own time and place, in his poetical creations. . . . By the assumption of this inferior office . . . he would resign participation in the cause'—the imagination. It is the lesser poets who 'have frequently affected a moral aim, and the effect of their poetry is diminished in exact proportion as they compel us to advert to this purpose.' But the power of imaginative projection is so great that he calls poets 'the founders of civil society.'
>
> The problem of the relation of art and morals is too often treated as if the problem existed only on

POOR COPY

BLEED THROUGH

the side of art. It is virtually assumed that morals are satisfactory in idea if not in fact, and that the only question is whether and in what ways art should conform to a moral system already developed. But Shelley's statement goes to the heart of the matter. Imagination is the chief instrument of the good. It is more or less a commonplace to say that a person's ideas and treatment of his fellows are dependent upon his power to put himself imaginatively in their place. But the primacy of the imagination extends far beyond the scope of direct personal relationships. Except where 'ideal' is used in conventional deference or as a name for a sentimental reverie, the ideal factors in every moral outlook and human loyalty are imaginative. The historic alliance of religion and art has its roots in this common quality. Hence it is that art is more moral than moralities. For the latter either are, or tend to become, consecrations of the *status quo*, reflections of custom, reenforcements of the established order. The moral prophets of humanity have always been poets even though they spoke in free verse or by parable. Uniformly, however, their vision of possibilities has soon been converted into a proclamation of facts that already exist and hardened into semi-political institutions. Their imaginative presentation of ideals that should command thought and desire have been treated as rules of policy. Art has been the means of keeping alive the sense of purposes that outrun evidence and of meanings that transcend indurated habit.

Morals are assigned a special compartment in theory and practice because they reflect the divisions embodied in economic and political institutions. Wherever social divisions and barriers exist, practices and ideas that correspond to them fix metes and bounds, so that liberal action is placed under restraint. Creative intelligence is looked upon with distrust; the innovations that are the essence of in-

COPY BOUND CLOSE IN CENTER

dividuality are feared, and generous impulse is put under bonds not to disturb the peace. Were art an acknowledged power in human association and not treated as the pleasuring of an idle moment or as a means of ostentatious display, and were morals understood to be identical with every aspect of value that is shared in experience, the 'problem' of the relation of art and morals would not exist.

The idea and the practice of morality are saturated with conceptions that stem from praise and blame, reward and punishment. Mankind is divided into sheep and goats, the vicious and virtuous, the law-abiding and criminal, the good and bad. To be beyond good and evil is an impossibility for man, and yet as long as the good signifies only that which is lauded and rewarded, and the evil that which is currently condemned or outlawed, the ideal factors of morality are always and everywhere beyond good and evil. Because art is wholly innocent of ideas derived from praise and blame, it is looked upon with the eye of suspicion by the guardians of custom, or only the art that is itself so old and 'classic' as to receive conventional praise is grudgingly admitted, provided, as with, say, the case of Shakespeare, signs of regard for conventional morality can be ingeniously extracted from his work. Yet this indifference to praise and blame because of preoccupation with imaginative experience constitutes the heart of the moral potency of art. From it proceeds the liberating and uniting power of art."

POOR COPY

BLEED THROUGH

## EXCERPT FROM ARTICLE BY VIRGINIA WOOLF

(Referred to in Footnote No. 23, Brief p. 36)

The late Virginia Woolf, noted English novelist and critic, and proprietor with her husband Leonard Woolf of the famous publishing house, The Hogarth Press, also suggested that if there should be any power to censor books as obscene (she was doubtful that there should be), the test must be the pornographic, *The Censorship of Books*, 105 The Nineteenth Century and After, 446 (1929).

She said (at p. 446):

> "* * * indecency * * * [may be] incidental to some other purpose—scientific, social, aesthetic—on the writer's part. The police magistrate's power should be definitely limited to the suppression of books which are sold as pornography to people who seek out and enjoy pornography. The others should be left alone. Any man or woman of average intelligence and culture knows the difference between the two kinds of book and has no difficulty in distinguishing one from the other."

It was her opinion that (p. 447) the law caused more harm to reader and writer than it prevents.

> "For both printer and publisher will be trying, uneasily and anxiously, to anticipate the verdict of the police magistrate and will naturally bring pressure to bear upon the writer to put them beyond the reach of the law. He will be asked to weaken, to soften, to omit. Such hesitation and suspense are fatal to freedom of mind, and freedom of mind is essential to good literature. Moreover, if modern books become so insipid, so blameless, so full of blank spaces and evasions that we cannot read them, we shall be driven to read the classics, where obscenity abounds.

COPY BOUND CLOSE IN CENTER

"For these reasons I think it desirable that the law should distinguish clearly between books that are written or sold for pornographic purposes and books whose obscenity is an incidental part of them —between Aristotle's works as they are sold in the rubber goods shops, that is to say, and Aristotle's works as they are sold in the shops of Messrs. Hatchard and Bumpus."

BLEED THROUGH POOR COPY

## EXCERPTS FROM ARTICLES BY FORSTER

(Referred to in Footnote No. 23, Brief p. 36)

E. M. Forster, eminent English critic, essayist and novelist, author of the well known and respected novel *A Passage to India* (certainly none of whose works could be called "obscene" under any test), has said; "Liberty in England," *Abinger Harvest* (1936) 68-69:

> "* * * I want greater freedom for writers, both as creators and as critics. In England, more than elsewhere, their creative work is hampered because they can't write freely about sex, and I want it recognized that sex is a subject for serious treatment and also for comic treatment; this latter aspect of it is usually ignored by speakers when they get on to platforms, so I don't wish to miss out."

The same author has also delivered his opinion more explicitly in *The Censorship of Books*, 105 The Nineteenth Century and After 444 (1929):

> "I know nothing of the law, and should only waste your readers' time if I attempted to amend the Campbell Act or to substitute for Cockburn's ruling some ruling of my own. I consider the Act, as at present interpreted, is both unfair to writers and against the public interest, but all I can do is to indicate three problems which seem to me important.
>
> "(1) Pornography. It was, I believe, to deal with pornographic books that the Campbell Act was passed. Such books ought to be suppressed, and they are easily detected and classified, for the reason that their aim is not literature but physical provocativeness. When, however, attempts are made to apply the Act to cases it was never intended to meet,

COPY BOUND CLOSE IN CENTER

> and to condemn books that are not pornographic at all, I find myself in complete opposition. To say of a book, as our Puritan reformers do, that it is 'spiritually corrupting'; that it is 'subtly insidous', that it 'has undesirable tendencies', that it is 'a borderline case' may sound very high-minded and helpful, but it opens the door to evils far more serious than any it might keep out, to official meddlesomeness over the whole of literature, to the paralyzing of authors, who can never be sure what they may or may not say, and to the exclusion of the public from its legitimate rights to aesthetic enjoyment and to information. No doubt it would be well if we could define 'spiritual corruption' and could legislate against it accordingly. But we cannot, for the reason that spiritual things are things of the spirit. The only safe test in the law is the pornographic, and it is the only point on which the police should prosecute and the courts decide."

Forster goes on to discuss blasphemy and homosexuality; of the latter he says (at p. 445):

> "It forms, of course, an extremely small fraction of the sum-total of human emotions, it enters personally into very few lives, and is uninteresting or repellent to the majority; nevertheless, it exists, and this being the case, I do not see why writers who desire to treat it should be debarred from doing so—always providing that there is nothing pornographic in their treatment."

BLEED THROUGH POOR COPY

## EXCERPT FROM ARTICLE BY NEILSON

(Referred to in Footnote No. 23, Brief p. 36)

William Allan Neilson, late president of Smith College, professor of English literature at Harvard, Columbia and the University of Paris, author and editor of many books on literature (See *Who's Who in America*), has said in *The Theory of Censorship*, 145 Atlantic Monthly 13, 14 (1930):

> "No one disputes the necessity of different measures in dealing with the mature and the immature, since, apart from a few extremists, all our educational measures take for granted that the young may be guarded from risks that may inflict injury before experience has been acquired and before reason has been developed to the point where the significance of the risks can be appreciated. So, in the case of certain types of literature, plays, and pictures, it is justifiable and probably necessary to seek to prevent the young from being exposed to them while their imaginations are highly impressionable and their self-control is undeveloped."

Neilson goes on to emphasize that this is a matter for parents and teachers rather than the police, but he suggests that prohibitions on sales to minors, on the analogy of the prohibitions on the sale of liquor, could be made in connection with books.

> "When we turn from the protection of adolescents to the problem of the adult, a quite different point of view is imposed, though certain prohibitions still seem to be justifiable. The adult has a right to be protected against display of offensive print or pictures where he cannot avoid them. The covers of books and magazines, and still more posters, are a fair subject of police control, since it is practically

COPY BOUND CLOSE IN CENTER

impossible not to have them thrust upon one's notice. Nor is the risk of poor judgment in selecting those to be suppressed an important one. One cannot honestly pretend that even a mistakenly rigorous policy in such matters would deprive the world of either truth or beauty to a noticeable degree." (at pp. 14-15)

"The opposition to the activity of the censor, however, has not been roused by attempts to save the sensibilities of the public from the outrages of the poster or the jacket. It has been due to the feeling that some branch of the government—post office, customs official, police, or mayor—has sought to save us without our consent from what it considered a demoralizing book or play. The resentment is due to what seems to many an officious intrusion, an interference with the responsibility of the adult individual for his own moral welfare." (at p. 15)

Then he discusses some absurdities: the fact that banned books sell better, etc.

"These absurdities in the administration of censorship serve only to strengthen the independent thinker's resentment against the essence of the practice. The saving of a man's soul, which one must presume is the object of the censorship, is after all a man's own affair and not to be achieved by external compulsion or guardianship. It is of a man's free will that he buys a ticket for a play or borrows a book from the library. If he wants to pander to the lower side of his nature, no censor will prevent him.

"Such arguments sometimes lead defenders of the censorship to abandon the strictly moral issue and seek a basis for suppression on aesthetic grounds. But it is clear that these give no firmer footing. The whole question of standards in art is dragged in,

POOR COPY

BLEED THROUGH

and it becomes evident that the result of decisions on the ground of good or bad art could only be the legalizing of the timid and conventional, and the blocking of all progress by the suppression of innovation and experiment. The fact that my personal taste is offended does not give me the right to interfere with my neighbor's choice of reading or of plays, unless he insists on reading aloud in my presence or forcing me into the theatre.

"A variant of the aesthetic argument is that which advocates prohibtion of a production because it deals with disease. The pathological, we are told, is no fit subject for art. But no one really believes in a principle that would prohibit *Hamlet*, *Lear*, and *Macbeth* because all three interest us in madness."

"* * * it is through freedom and not through compulsion that the human spirit gains in power and reach." (at p. 16)

COPY BOUND CLOSE IN CENTER